TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 101.

JAMES T. WORMLEY, PLAINTIFF IN ERROR,

vs

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JULY 18, 1899.

(17,468.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 17, 1900.

1 In the Court of Appeals of the District of Columbia.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
JAMES T. WORMLEY. } No. 885.

Supreme Court of the District of Columbia.

JAMES T. WORMLEY
vs.
THE DISTRICT OF COLUMBIA. } No. 42471. At Law.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss*:

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Petition for Writ of Certiorari.

Filed September 24, 1898.

In the Supreme Court of the District of Columbia.

JAMES T. WORMLEY, Petitioner,
vs.
THE DISTRICT OF COLUMBIA, Respondent. } At Law. No. 42471.

To the justice of said court, holding a special term at law:

The petition of your complainant, James T. Wormley, respectfully shows:

1.

That he is a citizen of the United States and a resident of the District of Columbia, and is the owner of a freehold estate in the following-described parcel of land, situated in the city of Washington, District of Columbia, and distinguished as sublot numbered one hundred and sixteen (116), in square numbered two hundred and seventy-four (274), sixty (60) feet on "U" street and twenty (20) feet on Thirteenth street; no other front.

2.

That heretofore, to wit, prior to the twenty-first day of July, A. D. 1896, the respondent, The District of Columbia, without authority in law, entered upon the tax and special assessment records in
2 its custody certain illegal taxes against the above-described property of your petitioner, namely, the sum of sixty-five dollars and twenty-four cents ($65.24), with interest from the twenty-first day of July, A. D. 1896, at the rate of ten per centum (10%) per annum, said charge purporting to be levied for the costs of the

following item, to wit, "curb and sidewalk on 'U' street;" said charge was in the name of William T. Walker and Samuel H. Wimsatt, said charge being levied for special assessments for improvements under the acts of Congress approved August sixth, A. D. 1890, and March the third, 1893.

3.

That afterwards, to wit, on the 17th day of April, A. D. 189–, your petitioner filed in this cause his petition for a writ of certiorari and therein prayed that the records of said assessments might be removed to this court for review, and that the same might be quashed as illegal and void, and the writ of certiorari was ordered issued on consideration of the said petition, and the said records were, upon return of the District of Columbia, removed to this court, and afterwards, upon review of said records, this honorable court, by its judgment rendered the 2nd day of May, A. D. 189–, declared said assessments illegal and quashed and annulled same; all of which appears more fully upon reference had to the said proceedings in certiorari, which are numbered 39839 upon the law docket of this court; and your petitioner upon information and belief says that said assessments were not quashed by reason of any imperfect or erroneous description of said land or parcels of land or because said assessment was not authenticated by the proper officer or for any defective or technical reason, but only because, as your petitioner is advised and believes, the assessment was substantially defective and included therein the absence of right in the Commissioners of the District of Columbia to levy said assessment; all of which will appear upon inspection of the said record in said cause.

4.

Your petitioner further says that, not regarding said judgment and wrongful assessment, and that said judgment was not based upon the grounds that said assessment was not properly authenticated, or that there was a defective return of notice, the Commissioners of the District of Columbia have caused to be entered upon the tax records of the said District a so-called reassessment of the said charge against said sublot, as the same is set forth in the first part of this petition, and the same now appears on the said records.

5.

Your petitioner avers, on advice of counsel, that the said judgment of this court in case numbered 39839 adjudicated said assessment to have been illegal, prayed as a part of the enforcement thereunder, and that said judgment not having been made and entered by reason of any technical or formal defect in said assessment,
3 the said Commissioners of the District of Columbia were without authority or jurisdiction to reassess said charge.

6.

Your petitioner further avers on information and belief that the

records in the custody of the respondent shows the following defects, which invalidates said assessment and said reassessment:

(*a.*) That the petitioner, as owner of the said land and parcels of land, did not request the doing of the work or the making of said improvements, and that he was not consulted as to its advisability, and that he had no opportunity to be heard upon the question or the costs of the utility and was not notified of the amount or amounts charged until after the work was completed and after said assessment had been made and had gone into effect as a lien on said property, which was not a reasonable time.

(*b.*) There was no notice given by advertisement, as required by law, of the work proposed to be done and for which the assessments herein complained of were made.

(*c.*) That the assessment and reassessment were made without authority in law and in excess of the jurisdiction of the Commissioners of the District of Columbia.

(*d.*) That the description of said parcels of land assessed is insufficient.

7.

Said charges are unpaid, and the respondent now threatens to sell and convey said land of your petitioner if same is not paid, in order to satisfy and pay said unlawful charges, whereby and in consequence whereof the title of your petitioner is clouded and he has no appeal.

Wherefore, the premises considered, your petitioner prays:

(1.) That a United States writ of certiorari may issue from this honorable court, commanding the respondent to certify immediately to this court, under its common seal, a copy of each and every record of the Commissioners of the District of Columbia relating in any manner to the reassessments for special improvements made against sublot one hundred and sixteen (116), in square numbered two hundred and seventy-four (274), in the name- of William T. Walker and Samuel H. Wimsatt, or in the name- of William T. Walker and S. H. Walker, and in the name of James T. Wormley, for "curb and sidewalk on 'U' street," as "permit work," under the supposed authority of the Commissioners of the District of Columbia, by virtue of the act of Congress approved April the 24th, A. D. 1896.

(2.) And that upon the coming in of said return all said illegal special assessments may be quashed and annulled by judgment of this court, and the respondent may be directed to cancel same on the records in its custody.

JOHN C. GITTINGS,
E. RICHARD SHIPP,
Attorneys for Petitioner.

4 DISTRICT OF COLUMBIA, *ss:*

Before me, the undersigned, personally appeared John C. Gittings, one of the attorneys for the petitioner, who, being duly sworn according to law, deposes and says that he has read over the foregoing petition by him subscribed as attorney for petitioner and knows

the contents thereof; that the matters and things therein stated of his personal knowledge are true, and that those therein stated of information and belief he believes to be true.

JOHN C. GITTINGS.

Subscribed and sworn to before me this 24th day of September, A. D. 1898.

J. R. YOUNG, *Clerk*.
By W. E. WILLIAMS, *Ass't Clk*.

Endorsed: Let the writ issue as prayed. L. E. McComas, asso. J.

Memorandum.

Sept. 27, 1898.—Certiorari, writ of, issued and returned served.

Return of Respondent.

Filed January 31, 1899.

In the Supreme Court of the District of Columbia, Holding a Circuit Court for said District.

JAMES T. WORMLEY
vs.
THE DISTRICT OF COLUMBIA ET AL. } At Law. No. 42471.

Return of the respondent, The District of Columbia.

And now comes the respondent, The District of Columbia, and for a return to the writ of certiorari issued herein certifies to the court the following true and accurate copies of the records and parts of records in its possession bearing on the assessment for special improvements in said petition referred to, as well as the official knowledge of its officers touching the same, in the said writs mentioned, namely, to wit:

1. Copy of advertisement of intention to reassess.
2. Copy of record of reassessment.
3. Tax bill—reassessment.
4. Return of service of notice of reassessment.

OFFICE OF THE
COMMISSIONERS OF THE DISTRICT OF COLUMBIA,
WASHINGTON, *June* 30, 1896.

Special assessments for improvements abutting upon the following property having been canceled by the supreme court of the District of Columbia since the passage of the act of Congress approved April 24, 1896, providing for reassessment, viz: Petitioner, Patrick
5 Wade; square 622, sublot 39, for sewer, $60.94; petitioner, City Investment Company; square 778, sublots 62 to 67, inc., for paving sidewalk and curb, amounting to *all* $187.50; petitioner,

James M. A. Spottswood; square 623, sublot 127, for the improvement of I street, $70.46; petitioner, James T. Wormley; square 274, sublot 116, for curb and sidewalk, $65.24, notice is hereby given that the Commissioners of the District of Columbia, by virtue of authority vested in them by said act of Congress, propose to reassess the abovementioned property for the local improvements named. Parties interested are hereby notified that said Commissioners of the District of Columbia will give a hearing, at the District building, on Friday, the seventeenth day of July, 1896, at twelve o'clock m., to any and all persons who may desire to object to said reassessments being made.

JOHN W. ROSS,
GEORGE TRUESDELL,
CHARLES F. POWELL,
Commissioners of the District of Columbia.

Published in the Evening Star June 30, July 1st, 10th, and 11th, 1896.

Official copy.

W. TINDALL, *Sec'y.*

No. 104,009.

SPECIAL ASSESSMENT OFFICE,
WASHINGTON, D. C., *July 20th*, 1896.

To the honorable Commissioners of D. C.

GENTLEMEN: I have the honor to submit for approval the following reassessment for curb and sidewalk on U street in front of square 274, under the act of Congress approved April 24, 1896, authorizing reassessments for improvements and general taxes, the assessment for said improvement having been quashed by the supreme court of the District of Columbia on the 2nd day of May, 1896, because of want of proper notice, as required by law:

Total cost of the work	$130.48
One-half to be reassessed against abutting property	65.24

Total frontage of abutting property, 60 lineal feet.

Rate per front foot ..... .430426

Very respectfully,
(Signed) J. W. DANIEL,
Special Assessment Clerk, D. C.

6 No. 104,009.

Amount reassessed against abutting property, being for one-half of the total cost of curb & sidewalk on U street, square 274, in the city of Washington, District of Columbia, pursuant to act of Congress approved April 24th, 1896.

Lot.	Feet abutting on street.	Feet abutting on work.	In name of—	Amount.
				Dollars. Cts.
Sub 116.....	60	60	Wm. T. Walker & Samuel H. Wimsatt.	65 24

No. 104,009.

OFFICE OF THE
COMMISSIONERS OF THE DISTRICT OF COLUMBIA,
WASHINGTON, D. C., *July 20th*, 1896.

We hereby certify that the foregoing reassessment is made by us under the act of Congress approved April 24, 1896, entitled "An act to authorize reassessment for improvements and general taxes in the District of Columbia, and for other purposes:" that it is based upon a statement of the cost of the work upon which the original assessment was made, prepared by us and filed in our office: that it — levied upon property abutting upon the improvement: that it is prorated according to the frontage of the property in question, and that it does not exceed one-half of the total cost of the labor and materials employed in said work. We further certify that the assessment for the foregoing improvement was quashed and set aside by the supreme court of the District of Columbia on the 2d day of May, 1896, by reason of want of proper notice as required by law.

(Signed) JOHN W. ROSS,
(Signed) GEO. TRUESDELL,
(Signed) CHAS. F. POWELL,
Commissioners of the District of Columbia.

Endorsed: Sp'l ass't office. Action. July 20th, 1896. Respectfully forwarded to the honorable Commissioners of D. C. (Signed) J. W. Daniel, sp'l ass't cl'k, D. C. Aug. 11, 1896. Returned by order. (Signed) W. Tindall, sec't'y. No. 221,684. C. O. No. —. Engineer dep't, 189–. No. 130,673. Special assessment division. Washington, D. C., July 20th, 1896. Daniel, J. W., sp'l ass't cl'k, D. C. Reassessment against sublot 116, square 274, for curb and sidewalk on U street, under act of Congress approved Ap'l 24th, 1896.

7 *Reassessment under Act of Congress Approved April 24th, 1896.*

Pay to the collector of taxes, D. C.
Book 1.
Folio 7.

Special assessment office, 464 La. Ave. N.W., 2d floor.

WASHINGTON, D. C., *July* 20, 1896.

Wm. T. Walker & Sam'l H. Wimsatt:

Sublot No. 116, square No. 274, abutting 60 feet on U St., is charged upon the books of this office for special improvements as follows:

	Dollars.	*Cents.*
For work done under acts of Congress approved 6th August, 1890, and 3rd March, 1893:		
Curb, $39.41; sidewalk, $25.83; all instalments.	65	24
Interest at — per centum per annum from ——		
Costs		
Total		

Received payment,

——— ——, .
Collector of Taxes.

The acts of Congress relative to special assessments provide as follows:

One-third of the assessment shall be paid within 60 days from date of service of notice of assessment.

One-third shall be paid within one year from date of service.

One third shall be paid within two years from date of service.

Interest shall be charged at the rate of — per centum per annum from the date of service of notice upon all amounts that remain unpaid at the expiration of 60 days after date of service.

Should this property become subject to sale for any other assessment or tax whatsoever, then this assessment will become immediately due and payable; and the property may be sold therefor, together with interest and costs.

Should this assessment, or any part thereof, remain unpaid at the expiration of two years from the date of service of notice of this assessment, this property will be subject to sale thereof or with interest and costs.

These provisions of law will be enforced.

J. W. DANIEL,
Special Assessment Clerk, D. C.

N. B.—If this property no longer belongs to you, please return this notice to this office with the name and address of the present owner.

Improvements and repairs, northwest.

Auditor's Coupon.

Book ..

Folio...

Special assessment office.

....

....

Assessment for Work Done under Act Approved 3rd March, 1893.

Square.	Lot.	Dolls.	Cts.
Interest at — per cent. from ——, 189–			
Costs			
Total.....			

..... Instalment.

Work .....

For further return your respondent shows that all the papers herein referred to are part of the public records of the District of Columbia, and the several officers whose names and official designations appear on the several records and papers herewith filed were, at the respective times of such their action, the duly
8 constituted officers of the District of Columbia authorized and required by law to take such action, and your respondent prays the same benefit of the exhibits herewith filed as if the same were duly incorporated at length herein and made part hereof.

And on the return hereby made this respondent prays that the writ of certiorari issued herein may be quashed and the petitioner's petition dismissed.

THE DISTRICT OF COLUMBIA.
By S. T. THOMAS &
A. B. DUVALL, *Its Attorneys.*

Motion to Quash Reassessment of Taxes.

Filed February 1, 1899.

To the Supreme Court of the District of Columbia.

JAMES T. WORMLEY, Petitioner, *vs.* DISTRICT OF COLUMBIA, Defendant. } At Law. No. 42471. In Certiorari.

Now comes the petitioner, by and through his attorneys, and moves the court to quash the reassessment as shown by the returns filed in the above-entitled case.

JOHN C. GITTINGS,
E. RICHARD SHIPP,
Attorney for Petitioner.

S. T. Thomas, Esq., attorney for defendant.

DEAR SIR: Please take notice that we shall call up the above motion, in circuit court No. 1, on Friday, Febr'y 3rd, 1899, at ten o'clock a. m., or as soon thereafter as counsel can be heard.

JOHN C. GITTINGS,
E. RICHARD SHIPP,
Attorneys for Petitioner.

Judgment.

Supreme Court of the District of Columbia.

SATURDAY, *February* 11, 1899.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

* * * * * * *

Decided by Justice Bradley.

JAMES T. WORMLEY, Petitioner, vs. THE DISTRICT OF COLUMBIA, Respondent. } At Law. No. 42471. Certiorari.

This cause coming on to be heard on motion of petitioner's counsel for judgment, and it appearing to the court upon inspection of the record returned by the respondent that the charges complained
9 of in the petition are illegal because said assessment and reassessment complained of were made without authority in law and in excess of the jurisdiction of the Commissioners of the District of Columbia, in that said assessment included an absence of right in said Commissioners to levy said assessment, it is this 11th day of February, 1899, adjudged by the court that the charge of $65.24 in the name of petitioner, assessed against sublot 116, in square No. 274, said property purporting to be assessed under authority of the Commissioners of the District of Columbia for "curb and sidewalk on U street," by virtue of act of Congress approved April 24, 1896, together with all costs, charges, and interest thereto, be, and the same hereby are, quashed and held for naught, and the respondent is hereby directed to cancel the same upon the records in its custody.

Order of Appeal.

Filed February 15, 1899.

In the Supreme Court of the District of Columbia, the 15 Day of February, 1899.

WORMLEY vs. THE DISTRICT OF COLUMBIA. } At Law. No. 42471.

The clerk of said court will please enter an appeal to the Court of Appeals from the judgment granted in the above cause and issue citation.

S. T. THOMAS,
Attorney for D. C.

In the Supreme Court of the District of Columbia.

JAMES T. WORMLEY vs. THE DISTRICT OF COLUMBIA. } At Law. No. 42471.

The President of the United States to James T. Wormley, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia on the 15th day of February, 1899, wherein The District of

Columbia is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 15th day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

JOHN R. YOUNG, *Clerk.*

10 Service of the above citation accepted this 15 day of February, 1899.

D. W. BAKER,
Attorney for Appellee.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the above and foregoing pages, numbered from 1 to 18, inclusive, to be a true and correct transcript of the record and proceedings in said court, as provided by rule 5 of the Court of Appeals of the District of Columbia, in cause No. 42571, at law, wherein James T. Wormley is plaintiff and The District of Columbia is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 10th day of March, A. D. 1899.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 885. The District of Columbia, appellant, *vs.* James T. Wormley. Court of Appeals, District of Columbia. Filed Mar. 11, 1899. Robert Willett, clerk.

11 TUESDAY, *May 2d, A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
JAMES T. WORMLEY } No. 885.

and

THE DISTRICT OF COLUMBIA, Appellant,
vs.
ANNA P. HOOVER ALLEN, ANDREW EASTWICK HOOVER, Charles P. Hoover, Fannie B. Byrne, Annie H. McAllester, Lulu L. Thornton, Heirs-at-law of Andrew Hoover. } No. 886.

The argument in the above-entitled causes was commenced by Mr. S. T. Thomas, attorney for the appellant, and was continued by Mr. D. W. Baker, attorney for the appellees, and by Mr. J. C. Gittings, attorney for the appellee in No. 885, and was concluded by Mr. A. B. Duvall, attorney for the appellant.

12 THE DISTRICT OF COLUMBIA, Appellant,
vs.
JAMES T. WORMLEY. } No. 885.

Opinion.

Mr. Justice SHEPARD delivered the opinion of the court:

1. The District of Columbia appeals from a judgment, rendered in a proceeding by *certiorari*, vacating the reassessment of certain special improvement taxes against sublot 116, in square 274, in the city of Washington. The lot, as described in the assessment proceedings and in the petition, fronts 60 feet on U street, and belongs to the petitioner. It was originally assessed under the act of August 6, 1890, and specially charged with the sum of $65.24, said amount being one-half of the cost of a curb and sidewalk constructed along said frontage. On a writ of *certiorari*, sued out by the petitioner, the supreme court of the District set aside said assessment on May 26, 1896, guided apparently, by the views expressed by this court in several analogous cases. Allman *v.* District of Columbia, 3 App. D. C., 8; Jones *v.* District of Columbia, 3 App. D. C., 26; District of Columbia *v.* Burgdorf, 6 App. D. C., 465.

13 2. In order to correct certain inequalities of taxation proceeding from these and other adverse decisions, and pursuant, it is said, to a suggestion made in the Burgdorf case, *supra*, p. 481, Congress passed an act to authorize reassessment for improvements and general taxes. This act, approved April 24, 1896, reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Commissioners of the District of Columbia be, and they are hereby, authorized and directed, in all cases where general taxes or assessments for local improvements in the District of Columbia may hereafter be quashed

set aside, or declared void by the supreme court of said District, by reason of an imperfect or erroneous description of the lot or parcel of ground against which the same shall have been levied by reason of such tax or assessment not having been authenticated by the proper officer, or of a defective return of service of notice, or for any technical reason other than the right of the public authorities to levy the tax or make the improvement in respect of which the assessment was levied, to reassess the lot or parcel of ground in respect of such general taxes or the improvement mentioned in such defective assessment, with power to collect the same according to existing laws relating to the collection of assessments and taxes: *Provided*, That in cases where such taxes or assessments shall be quashed or declared void by said court, for the reasons hereinbefore stated, the reassessment herein provided for shall be made within 90 days after the judgment or decree of said court quashing or setting aside such taxes or assessments and any amount heretofore paid upon an assessment which has been declared void shall be credited the owner upon the reassessment made under the provision of this bill."

3. On June 30, 1896, the District Commissioners published, in a newspaper of the city of Washington, a notice of intention to reassess, against certain lots therein named—including that of petitioner—one-half the costs of the improvements that had been made. The owners were by name notified that the Commissioners would give a hearing at the District building, on Friday, July 17, 1896, at 12 o'clock, m., to any and all persons who might desire to object to said reassessments being made. From the return to the writ it appears that petitioner made no appearance; and, on July 20, 1896, the Commissioners reassessed the said lot with the charge of $65.24, the same being one-half of the actual cost of the improvement for which the original assessment had been made.

4. The provision of the general appropriation act of August 6, 1890, under which the work had been done, authorized the Commissioners to construct and improve curbs and sidewalks, when in their opinion necessary for the public health, safety and comfort. One-half of the actual cost was ordered to be assessed against the abutting property, and "levied *pro rata* upon said property according to its linear frontage, upon such terms and regulations as to notice to proprietors, and the methods and terms of such notice, as shall seem to the Commissioners right and proper, due notice of such terms and regulations being given by publication thereof in some newspaper published in the city of Washington for such time as said Commissioners shall prescribe." 26 Stat., 296.

In Jones *v.* District of Columbia, 3 App. D. C., 26, 39, it was held that to make an assessment under said act valid, notice must be given to the owner at some serviceable stage of the assessment proceeding, and not after its completion, in the form, practically, of a demand for payment. In District of Columbia *v.* Burgdorf, 6 App. D. C., 465, 478, 486, under an act which, like that of 1890, provided a uniform rate of assessment of the property abutting on the local improvement, it was held that notice to the owner was not necessary before the commencement of the work, but only before the settle-

ment and entry of the assessment upon the tax record. "Under that notice," it was said, "all questions and objections, not concluded by legislative action, may be taken and urged against the whole proceeding. This, in such case, would seem to be all the notice that the property-owner really requires or is entitled to receive." And in cases of assessments under such acts, it was also said, that the writ of *certiorari* will lie when required to effect substantial justice, but not to allow a party to avail himself of technical objections, or mere irregularities in the proceedings. *Idem*, p. 471.

The doctrine of the Burgdorf case, in respect of notice required, was reaffirmed in Parsons *v.* District of Columbia, 8 App. D. C., 391:

That case was appealed to the Supreme Court of the United States and the decision affirmed.

As stated in the opinion of the Supreme Court: "The proposition chiefly urged is, that, in all cases where proceedings are to be had for the taking of property, or to impose a burden upon it, the statute itself must provide for notice to the property-owner; otherwise it is unconstitutional; and that the statutes under which the present proceeding was had did not provide for notice to the owner of land to be assessed, nor give him an opportunity to be heard." In affirming the constitutionality of the act and the validity of the assessment, it was said: "There is a wide difference between a tax or assessment prescribed by a legislative body, having full authority over the subject, and one imposed by a municipal corporation, acting under a limited and delegated authority. And the difference is still wider between a legislative act making an assessment, and the action of mere functionaries, whose authority is derived from municipal ordinances. * * * When by the act of August 11, 1894, Congress enacted that thereafter assessments levied for laying water mains in the District of Columbia should be at the rate of $1.25 per linear foot against all lots or land abutting upon the street, road or alley in which a water main shall be laid, such act must be deemed conclusive alike of the question of the necessity of the work and of the benefits as against abutting property. To open such questions for review by the courts, on the petition of any or every property-holder, would create endless confusion. Where the legislature has submitted these questions for inquiry to a commission, or to official persons to be appointed under municipal ordinances or regulations, the in-
14 quiry becomes in its nature judicial in such a sense that the property-owner is entitled to a hearing, or to notice or an opportunity to be heard." Parsons *v.* District of Columbia, 170 U. S., 45, 52.

This doctrine, in respect of the power of Congress, *generally*, to determine the propriety of a public improvement, the lands benefited thereby which may be subjected to special assessment to meet the cost, and the rule of ascertainment, is not overthrown by the recent decision in Norwood *v.* Baker, 172 U. S., 269. That case, as we understand it, denies only the unlimited discretion of the legislature in the premises, and declares that the substantial benefits, actually received, constitute the boundary.

As was said by Mr. Justice Harlan, in delivering the opinion of the majority of the court:

"It is one thing for the legislature to prescribe it as a *general* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum representing the whole cost of the improvement, and without any right in the property-owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking under the guise of taxation of private property for public use without compensation." *Idem*, p. 279. Parsons *v.* District of Columbia is not denied, but approved with this qualification of what might else be inferred from the decision: "If the costs of laying the water mains in question in that case had exceeded the value of the property specially assessed, or had been in excess of any benefits received by that property, a different question would have been presented." *Idem*, p. 295.

The authority of the actual decision in the Parsons case remains, therefore, unimpaired for our observance. Congress may order a local improvement, designate the property to be assessed on account of special benefits, and prescribe the proportion of the amount, and the rule of ascertainment, without preliminary notice to the owners to appear and be heard in respect of the propriety or character of the improvement, or the designation of the taxing district or area. See, also, Williams *v.* Eggleston, 170 U. S., 304, 311. But in doing this, Congress may not substantially exceed the actual benefits which the owner of the abutting or neighboring property shall receive from the improvement. And if it does, the assessment may be corrected, or vacated by injunction—which was the remedy applied in Norwood *v.* Baker—or through some other appropriate proceeding.

5. That the construction of sidewalks in the streets of the city of Washington is not only of advantage to the public, but also a special benefit, in some measure, to the abutting lots of private owners, seems to admit of no reasonable question; and the power of Congress to require their construction partly at the cost of such owners, when the charge imposed does not substantially exceed this benefit, is likewise undoubted. This being the case, notice to the owner is necessary, only, at some time before the settlement of the assessment against his property, in order that he may be heard, if he so desire, to question the constitutionality of the law, the facts in respect of the cost of the work, and whether the amount charged exceeds the special benefit received by him. District of Columbia *v.* Burgdorf, 6 App. D. C., 465, 481; Spencer *v.* Merchant, 125 U. S., 345, 357; Norwood *v.* Baker, 172 U. S., 296.

Original assessments under different acts of Congress have been

declared invalid for the failure to give some such notice, but not for the want of power to make them in a regular manner with due regard to the rights of private owners. Allman *v.* District of Columbia, 3 App. D. C., 8, 24; Jones *v.* District of Columbia, 3 App. D. C., 26; Burgdorf *v.* District of Columbia, 6 App. D. C., 465.

Where an assessment has been vacated upon such grounds, there can be no doubt of the power of the legislature to provide for a reassessment through a proceeding having due regard to the constitutional rights of the land-owner. Spencer *v.* Merchant, 125 U. S., 345; Norwood *v.* Baker, 172 U. S., 269, 293, 295.

The act of Congress, under which the reassessment complained of in this case was made, is recited above. That act not only directed a reassessment where one had been vacated for certain irregularities specifically mentioned, but also "for any technical reason other than the right of the public authorities to levy the tax or make the improvement in respect of which the assessment was levied." The plain intention of the act seems to be, that, where there is a valid law ordering, or conferring the right to order, an improvement which is within the power of Congress, and imposing, or ordering the imposition of, a tax therefor, no property-owner shall escape the burden by reason of any irregularity in the original assessment, provided the Commissioners shall, within ninety days from the date of the judgment or decree annulling the same, reassess it in the proper manner. The reassessment of petitioner, as shown by the record of the proceedings exhibited in the return to the writ, appears to have been regularly made in conformity with the law. The Commissioners provided a rule regulating the giving of notice to the parties interested. That notice was given in this case to the petitioner to appear and present his objections to the proposed reassessment. The place, day and hour of the hearing were stated in the notice. He failed to appear and the Commissioners, after his default, proceeded to assess against his property the amount of one half of the actual cost of the improvements as ascertained by them. There is no claim whatever that the amount assessed exceeded the special benefit received from the improvement.

6. No exception was taken to the return made to the writ in the court below, but objection is now made to its sufficiency because it does not show the particular grounds upon which the first assessment was vacated. The contention is that it must therefore be presumed that the assessment was declared void because of the invalidity of the act of Congress conferring the power to make the improvement and to assess any part of the cost against the abutting lots. We pass by the question whether such an objection to the return should not have been specially made in the court below, where, if found well taken, the defect could have been amended.

It is also unnecessary to determine whether that judgment was an essential part of the proceedings in reassessment, for, if so, the necessity for its inclusion in the return was obviated by the action of the petitioner himself, who set it out in general terms as if a material part of his own case.

At any rate, the act of Congress under which that assessment was

made was not, and therefore could not have been held to be, unconstitutional. Consequently, the only ground upon which it could have been vacated was the want of the requisite notice, or the existence of some other irregularity in the proceeding—amounting to a denial of due process of law.

Having given the questions involved in this case the consideration which their grave importance to both public and private interests demand, we perceive neither want of power to make the reassessment nor substantial irregularity in the proceedings therefor. If we have mistaken the effect of the decision in Norwood *v.* Baker, or erred in its application to the facts of this case, we are gratified to know that the petitioner is not without remedy in the court of last resort.

For the reasons given, the judgment vacating the reassessment will be reversed with costs, and the cause remanded with direction to dismiss the petition.

Reversed.

16 TUESDAY, *June 6th, A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant, *vs.* JAMES T. WORMLEY. } No. 885, April Term, 1899.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause vacating the reassessment be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the said supreme court with direction to dismiss the petition.

Per MR. JUSTICE SHEPARD.

June 6, 1899.

17 THURSDAY *June 8th, A. D.* 1899.

THE DISTRICT OF COLUMBIA, Appellant, *vs.* JAMES T. WORMLEY. } No. 885.

On motion of Mr. D. W. Baker, of counsel for the appellee in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond, to act as a supersedeas, in the sum of two hundred and fifty dollars.

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between The District of Columbia, appellant, and James T. Wormley, appellee, a manifest error hath happened, to the great damage of the said appellee, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

19 Know all men by these presents the we, James T. Wormley, as principal, and Benjamin L. Wheeler, as surety, are held and firmly bound unto the District of Columbia in the full and just sum of two hundred and fifty dollars, to be paid to the said District of Columbia, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between The District of Columbia, appellant, and James T. Wormley, appellee, a judgment was rendered against the said James T. Wormley, and the said James T. Wormley having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said District of Columbia, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said James T. Wormley shall prosecute said writ of error to effect and answer all damages and costs if he fails to make his plea good, then

the above obligation to be void; else to remain in full force and virtue.

JAMES T. WORMLEY. [SEAL.]
By JOHN C. GITTINGS, [SEAL.]
Att'y-in-fact.
BENJAMIN L. WHEELER. [SEAL.]

Sealed and delivered in the presence of—
WM. C. JEWBY,
Witness to Both Signatures.

O K.
A. B. DUVALL.

Approved by—
R. H. ALVEY,
Chief Justice.

[Endorsed:] No. 885. The District of Columbia, appellant, *vs.* James T. Wormley. Bond on writ of error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jun- 22, 1899. Robert Willett, clerk.

20 UNITED STATES OF AMERICA, *ss:*

To the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein James T. Wormley is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 22d day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.
A. B. DUVALL,
For Defendant in Error.

June 22, 1899.

21 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 20, inclusive, contain a true copy

of the transcript of record and proceedings of said Court of Appeals in the case of The District of Columbia, appellant, *vs.* James T. Wormley, No. 885, April term, 1899, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 6th day of July, A. D. 1899.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No., 17,468. District of Columbia Court of Appeals. Term No., 101. James T. Wormley, plaintiff in error, *vs.* The District of Columbia. Filed July 18th, 1899.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 101.

JAMES T. WORMLEY, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

STATEMENT OF CASE.

This is a writ of error from the Court of Appeals of the District of Columbia.

On September 24, 1899, the plaintiff in error filed in the supreme court of the District of Columbia a petition praying for the writ of certiorari against the District of Columbia. The petitioner sets up, among other things, that some time prior to the 21st day of July, 1896, the District of Columbia, without authority in law, entered upon the tax and special assessment records in its custody certain illegal taxes against sublot 116, in square 274, for the sum of sixty-five dollars and twenty-four cents ($65.24), with interest at the rate of ten (10) per cent. per annum, said charge purporting to be levied for the cost of the following item: "Curb and sidewalk on U street," charged in the name of William T. Walker and Samuel Wimsatt, said tax being levied

for special improvements under acts of Congress approved August 6, 1890, and March 3, 1893; that afterwards the petitioner filed his petition for writ of certiorari for the purpose of having said tax quashed, and, upon review of the records, the supreme court of the District of Columbia, by its judgment in law number 39839, quashed the said taxes on the ground that said assessment was substantially defective, and that the Commissioners of the District of Columbia had no right to levy it; that, not regarding said judgment and wrongful assessment, and not regarding the fact that the said assessment did not come within the special-assessment law, in that said assessment was not quashed upon the grounds that said assessment was not properly authenticated, or that there was a defective return of notice, the Commissioners of the District of Columbia did enter upon their records a so-called reassessment of said charge against said sublot for exactly the same amount, and petitioner in his petition avers that said reassessment is illegal, unlawful, and that the Commissioners of the District of Columbia *had no authority in law to make said reassessment.*

Whereupon the writ of certiorari was issued, and the return shows that there was merely a recasting of certain figures by one J. W. Daniels, special assessment clerk of the District of Columbia; and then there was filed a somewhat curious document signed by the Commissioners themselves, which attempted to do away with the necessary records by making up statements which are not warranted by the record in this cause (R., p. 6). Upon this return a motion was made to quash the reassessment and granted, and the supreme court of the District of Columbia adjudged that said alleged reassessment was illegal, "*because said assessment and reassessment complained of were made without authority in law* and in excess of the jurisdiction of the Commissioners of the District of Columbia." An appeal was taken to the Court of Appeals of the District of Columbia, and that court, on the second day of May, 1899, reversed the decision of the court below, vacated the judg-

ment, and ordered the petition to be dismissed, and then the writ of error was sued out to this court.

ASSIGNMENT OF ERRORS.

First. The Court of Appeals erred in reversing the judgment of the supreme court of the District of Columbia and dismissing the petition in certiorari.

Second. The Court of Appeals erred in not affirming the judgment of the supreme court of the District of Columbia.

Third. The Court of Appeals erred in not holding the return of the defendant in error insufficient.

Fourth. The Court of Appeals erred in not holding the acts of Congress of August 6, 1890, of August 7, 1894, and of April 24, 1896, unconstitutional and the proceedings had thereunder null and void.

Fifth. That the Court of Appeals erred in holding the said reassessment in this case valid and not an infringement of the constitutional rights of petitioner, in depriving him of his property without due process of law and without just compensation.

ARGUMENT.

The errors assigned in this cause involve the validity of the several acts of Congress mentioned above, as well as the construction of the same. The act of Congress of August 6, 1890 (26 Statutes at Large, 296), reads as follows:

"That hereafter the Commissioners of the District of Columbia are authorized to order such above-enumerated work (repair and improvement of alleys and sidewalks) as in their opinion is necessary for the public health, safety and comfort and to pay the total costs of such work out

of the appropriations therefor, *one-half of such work, including material and labor, shall be charged against and become a lien upon the property abutting upon the line of such improvement and shall be levied pro rata according to the linear frontage of each lot or part of lot abutting upon such improvement.*"

The original assessment was made under this act, and by the decision of the Court of Appeals the proceedings had under this act were held null and void and unconstitutional and of no effect (Allman *vs.* District of Columbia, 3 App. Cases D. C., 8). Then was passed the act of August 7, 1894 (28 Statutes at Large, 247), which reads as follows:

"For assessment and permit work, one hundred and sixty-five thousand dollars ($165,000) * * * and *one-half the cost thereof shall be assessed against the abutting property* and collected as herein provided for assessment and permit work. Provided that hereafter the Commissioners of the District of Columbia are authorized and empowered, whenever in their judgment the public health, safety or comfort require it, * * * to improve and repair alleys and sidewalks and to construct sewers and sidewalks in the District of Columbia of such form and material as they may determine, and to pay the total costs of such work from appropriations for assessment and permit work.

"Said Commissioners shall give notice by advertisement twice a week for two weeks in some newspaper published in the city of Washington, of any assessment-work proposed to be done by them under this act, designating the location and the kind of work to be done; specifying the kinds of material to be used, the estimated cost of the improvement and fixing a time and place, when and where the property-owners to be assessed can appear and present objections thereto, and for hearing thereof. *One-half of the total cost of assessment-work herein provided for, including the expenses of the assessment, shall be charged against and become a lien upon abutting property, and an assessment therefor shall be levied pro rata according to the linear frontage of said property.*"

On account of the suggestion in the case of The District of Columbia *vs.* Burgdorf, 6 App. Cases D. C., 481, in which

the court, after holding the water-main assessment invalid, said:

"The only suggestion that we can make is that a curative act of Congress be procured extending the time for assessments and notice."

There was passed on April 24, 1896 (29 Statutes at Large, 98), an act known as the reassessment act, which is as follows:

"That the Commissioners of the District of Columbia be, and they are hereby, authorized and directed, in all cases where general taxes or assessments for local improvements in the District of Columbia may hereafter be quashed, set aside or declared void by the supreme court of said District, *by reason of an imperfect or erroneous description of the lot or parcel of ground against which the same shall have been levied by reason of such tax or assessment not having been authenticated by the proper officer, or of a defective return of service of notice, or for any technical reason other than the right of the public authorities to levy the tax or make the improvement in respect of which the assessment was levied*, to reassess the lot or parcel of ground in respect of such general taxes or the improvement mentioned in such defective assessment, with power to collect the same according to existing laws relating to the collection of assessments and taxes: *Provided*, That in cases where such taxes or assessments shall be quashed or declared void by said court, for the reasons hereinbefore stated, the reassessment herein provided for shall be made within 90 days after the judgment or decree of said court quashing or setting aside such taxes or assessments and any amount heretofore paid upon an assessment which has been declared void shall be credited the owner upon the reassessment made under the provision of this bill."

Looking at this reassessment act, it will be found that it is very vague and uncertain in its language. It provides for no method of reassessment unless we construe it, as it was construed by the Court of Appeals, to mean that the reassessment was to be *according to existing laws relating to the collection of assessments and taxes.* Upon reading the

act it will be seen that it hardly admits of this construction. The statement "according to existing laws" relating to the collection of assessments and taxes merely applies to the power of collecting the assessments, and nowhere in the act was it provided or is it stated the manner in which the reassessment shall be made. The Commissioners of the District of Columbia proceeded to merely recast the former assessment which was under the act of 1890, and in their return in case No. 101 they charge against the property *one-half of the cost of the assessment*, whereas in case No. 102, which is not printed and in which there is a printed stipulation stating that that case is similar to this case, with the exception that the reassessment was one-third of the alleged cost of the improvement, *they charge the property with one-third the cost of assessment.*

Now the Commissioners claim that this reassessment was made in accordance with the provisions of the act of Congress of August 7, 1894.

We will first consider the assignments of error that involve the validity of these several acts of Congress. It is only necessary to say that it is our contention that both the original act, under which this assessment was made, and the act of 1894 and the reassessment act, under which the present assessment was made, are unconstitutional, null, and void, because they lay down a rule for special assessment and reassessment without any regard to the benefit of the property assessed. The several acts of Congress provide for an assessment or reassessment of property by a rule *that does not take into consideration the benefit accruing to the property itself*, and whatever may have been the decisions of different courts in regard to this question, the question itself is now well settled by this court in the late case of The Town of Norwood *vs.* Baker, 172 U. S., 269, where this court lays down the proposition that it makes no difference whether the amount of the assessment levied may not be exactly the same as the one that

would be levied under a rule that will take into consideration the benefit done to the property, still the assessment is void, because the rule or law under which it is made is unconstitutional and of no effect, and the Court of Appeals of the District of Columbia, in a late case of Wight *et al. vs.* Davidson *et al.*, which was lately argued in this court, being No. 283 of October term, 1900, have since their decision in this case considered that the case of Norwood *vs.* Baker lays down an absolute rule upon the matter of special assessment, and thus, in speaking of Norwood *vs.* Baker, say:

"The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one. * * * The present case is one of illegal assessment under a *rule or system* which, as we have stated, violated the Constitution, in that the entire cost of the street improvement was imposed upon the abutting property by the front foot, *without any reference to special benefits.*"

And in this cause there is imposed upon the abutting property by the front foot one-half of the costs of the street improvement, together with cost of assessment, without any reference to special benefit, and upon an examination of the authorities in this court it will be found that nowhere do they hold that an arbitrary assessment can be made against property without any regard to the benefit accruing to the property. It will be noticed that the Court of Appeals take a different view of Norwood *vs.* Baker in the case of Wight *et al. vs.* Richardson *et al.* from the view expressed in this case. Here they merely say that they do not think that Norwood *vs.* Baker applies, and rely upon the case of Parsons *vs.* District of Columbia, 170 U. S., 45–52, but it is insisted that the Parsons case has no application to the case of special assessments. In Norwood *vs.* Baker, speaking of that case, the Supreme Court say:

"The power conferred upon the Commissioners (in that case) was, not to make assessments upon abutting properties, nor to give notice to the property-owners of such assessments, but to determine the question of the propriety and necessity of laying water mains and water pipes, and of erecting fire plugs and hydrants, and their *bona fide* exercise of such power cannot be reviewed by the courts."

Following the decision of the Supreme Court of the United States in the Norwood *vs.* Baker case, courts all over the country have held special assessments void and unconstitutional where they were made *without any regard to the benefit conferred on the property.*

An act that provides that *the cost or a proportion of the cost* of the street improvement shall be assessed against abutting property *by the frontage measurement, without any regard to special benefits, and providing for no notice and hearing to ascertain and determine the actual benefits specially received by the land-owners by reason of such improvement,* the only notice and hearing being one to revise and correct the report and estimate of the engineer to make it conform to the prescribed basis of assessment, violates the constitutional provisions against the taking of private property without just compensation and is a denial of the equal protection of the law.

Charles *vs.* The City of Marion, 100 Fed. Rep., 538.
Lyons *vs.* Tonawanda, 98 Fed Rep., 361.

The legislature has no power to assess property for a local improvement without giving *the property-owners an opportunity to be heard on the question whether the improvement for which the assessment was levied was a benefit to the property.*

Hutcheson *et al. vs.* Storrie, 92 Tex., 685.
Sears *vs.* Boston, 53 N. E. Rep., 876.
City of Detroit *vs.* Court, 112 Mich., 588.
Loeb *vs.* County, 91 Fed. Rep., 37.
Walsh *vs.* Baron, 55 N. E. Rep., 164.

Nor does the case of Mattingly *vs.* The District of Columbia, 97 U. S., 687, in any way conflict with the above decisions. In that case, which upheld the special assessment made, the act under which the same was levied prescribed that the assessment for special improvements could be made upon property adjoining which was *especially benefited* by levying a reasonable proportion of the cost, not in any case to exceed one-third of such cost. It will be seen that in this case the assessment was to be made upon property specially benefited, and the act fixed the maximum amount. In the case here under consideration, an arbitrary amount is set without any regard to the benefit, and no notice is provided or any provision made for allowing property-owners to come in to question whether or not the special improvement is a benefit to their property, and, if so, in what amount. This is in plain violation of the Constitution of the United States, and comes within the rule laid down in Norwood *vs.* Baker, and therefore the reassessment made in this case, as well as that made in number 102, should be held invalid and of no effect.

On an examination of the several acts set out in this brief and under which it is alleged this assessment was made it will be seen that none of them provide for the assessment against the abutting property *according to the benefit accruing to that property*, and that none of them provide for any notice or process on the property-owner for the purpose of ascertaining the benefit bestowed on the property by the assessment; that the act of April 24, 1896, is uncertain in its provisions, in that it provides for absolutely nothing except a supposed reassessment, without setting out how the same shall be made or what notice, if any, shall be given under this act, and there is no ordinance or public regulation requiring any notice of reassessment. The record is silent as to any notice given to the property-owners for this reassessment. It merely set out a publication under the act of August 7, 1894, without showing that the property-owner

should suppose that the Commissioners were going to proceed by publication under that act, and, as stated before, the order of publication as it appears in the record provides no notice which would in any way benefit the property-owners or permit them to inquire into questions of the extent of the benefit conferred upon their property.

On an examination of the record it will be seen that the District of Columbia in its returns failed to return the record in its custody and control in regard to the original as well as the reassessment, and that in case number 101 the assessment is for one-half of the full cost of the improvement, while in number 102 the assessment is for one-third of the value of the improvement. (See stipulation filed.)

Considering the return as containing all that would be proper for the record to show in these cases, it is contended on the part of the plaintiffs in error that the Commissioners of the District of Columbia had no authority, independent of the constitutional question, to make this assessment.

The act does not give them the right to reassess in all cases, but it says that a reassessment may be made where the original assessment is declared void "by reason of an imperfect or erroneous description of the lot or parcel of ground against which same shall have been levied by reason of such tax or assessment not having been authenticated by the proper officer, or of a defective return of service of notice, or for any technical reason other than the right of public authorities to levy the tax or make the improvement in respect of which the assessment was levied." It will be observed that this original assessment was quashed by reason of the fact that the Commissioners of the District of Columbia had no authority or jurisdiction to levy the tax or make the assessment because they proceeded without due process of law, and their action was unconstitutional, null, and void. The assessment itself was not merely null and void, but the whole action of the Commissioners of the District of Colum-

bia was null and void, and it was attempting to take the property of parties interested without due process of law (Allman *vs.* District of Columbia, 3 App. D. C., 8).

Unless the Commissioners had jurisdiction in the original assessment, they have no right to make a reassessment. Jurisdiction implies more than merely jurisdiction of the subject-matter, but also jurisdiction of the parties and procedure according to rules of law; so, even if the Commissioners had in themselves the right to make this assessment, still if they failed to acquire jurisdiction over the parties, or to proceed according to due process of law, they had no right whatever to make the assessment originally made in these cases.

Again, the law is plain in setting out when a reassessment can be made. It states specific cases, none of which go to the question of jurisdiction, and among which are included the defective return of the service of notice, and then the law says, "or for any technical reason other than the right of the public authorities to levy the tax or make the improvement," thereby showing that if the assessment was quashed for merely a technical defect a reassessment can be made, *but leaving it plain and clear that where the defect was jurisdictional, or where the party was by the assessment deprived of his property without due process of law, no reassessment can be made.* When we look at the decision of this court, and also look at the statute here involved, we find that the law was made at the suggestion of this court when, in deciding the case of District of Columbia *vs.* Burgdorf (the water-main case), 6 App. D. C., 465, the court suggested that relief should be had by applying to Congress, and asking that the District be permitted to reassess the tax quashed in cases where there was merely a technical defect; but the action in that case on the part of the Commissioners was within their jurisdiction and did not deprive any one of his property without due process of law.

For the reasons here stated, the principal one being the constitutional question involved, it is insisted that the Court of Appeals erred in reversing the judgment of the supreme court of the District of Columbia, and that the decision of the Court of Appeals should be reversed and the judgment of the supreme court of the District of Columbia confirmed.

D. W. Baker,
John C. Gittings,
Malcolm Hufty,
Attorneys for Plaintiffs in Error.

Office Supreme Court U.S.
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No. 101.

Wormley v. Duvall

Filed Nov. 19, 1900.

Supreme Court of the United States.

October Term, 1900.

No. 101.

JAMES T. WORMLEY, Plaintiff in Error,

vs.

DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

ANDREW B. DUVALL,
CLARENCE A. BRANDENBURG,
Attorneys for Defendant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 101.

JAMES T. WORMLEY, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

The District of Columbia, the defendant in error, laid a curb and sidewalk in front of sublot No. 116, square No. 274, abutting 60 feet on U street, in the city of Washington, D. C., pursuant to authority conferred by the act of Congress approved August 6, 1890, and, as required by the terms of said act, levied an assessment against said lot for the sum of $65.24, being one-half of the cost of the work. Some time thereafter, the owner of said property filed a petition in the Supreme Court of the District of Columbia for a writ of certiorari, and therein prayed that the records of said assessment might be removed to the court for review and that the assessment should be quashed as illegal and void for certain reasons alleged, but principally because the work had been done and the assessment made without notice. Upon the filing of the petition, the Supreme Court of the District of Columbia granted the writ of certiorari *ex parte*, and pursuant thereto the District of Columbia certified

to said court true copies of its record relating to said assessment. The plaintiff in error thereupon moved to quash the tax, notwithstanding the return, and the motion was granted. The tax was quashed, as will appear hereafter, because the owner of the property had not received proper notice of the assessment as required by law.

Thereafter, on the 20th day of July, 1896, the Commissioners of the District of Columbia reassessed against said lot the amount of said tax, pursuant to the provisions of the act of Congress approved April 24, 1896, entitled "An Act To Authorize Reassessments For Improvements and General Taxes in the District of Columbia, and For Other Purposes."

This reassessment was made after due publication in a newspaper in the city of Washington, of a notice of the intention of the Commissioners to reassess the land of the petitioner for one-half of the cost of the improvements that had been made. The petitioner was specifically named in said notice and by the terms thereof was informed that a hearing would be given at the District building on Friday, July 17, 1896, at 12 M. to any and all persons who might desire to object to said reassessment being made. From the return to the writ of certiorari (Rec., pp. 4, 5, 6), it appears that the petitioner made no appearance; and accordingly, as required by law, the Commissioners on July 20, 1896, reassessed the lot of the petitioner for the sum of $65.24, being one-half of the actual cost of the improvement for which the original assessment had been made.

Thereupon, the plaintiff in error filed a second petition for writ of certiorari on the 24th day of September, 1898, praying that the defendant might certify to the Supreme Court of the District of Columbia, true copies of its records pertaining to said reassessment, and that on the coming in of the same, the reassessment might be quashed on the ground that the petitioner did not request the doing of the work, that he was not consulted as to its advisability, that

he had no opportunity to be heard as to the cost or utility of the work and was not notified of the amount of the charge until after the work was completed and the assessment had been made; also because, as claimed, there was no notice by advertisement of the work proposed to be done and for which the assessment was made and because the assessment and reassessment were made without authority of law and in excess of the jurisdiction of the Commissioners.

Pursuant to the writ issued upon said petition, the Commissioners certified to the court a copy of the advertisement (which had been duly published) of their intention to reassess the petitioner's lot, copy of the record of reassessment, the reassessment itself and return of service of notice of such reassessment.

Thereupon, the petitioner moved to quash the reassessment shown by said return, which motion was granted by the justice holding the Supreme Court of the District of Columbia. From the judgment of that court, quashing said reassessment, the District of Columbia prosecuted an appeal to the Court of Appeals of the District, which court on May 2, 1899, reversed the judgment of the Supreme Court of the District of Columbia, sustained the validity of the reassessment and remanded the cause to the court below, with directions to dismiss the petition. From this judgment of the Supreme Court of the District of Columbia, a writ of error has been prosecuted by the petitioner to this court.

ARGUMENT.

The errors assigned in this case involve the validity of the act of Congress approved August 6, 1890 (26 Stats. 296), under which the curb and sidewalk were laid and the assessment against the property of the plaintiff in error was made, and also, the validity of the act of Congress approved April

24, 1896 (29 Stats. 98), authorizing the reassessment of taxes quashed—

> "by reason of an imperfect description, . . . defective return of service of notice or for any technical reason other than the right of the public authorities to levy the taxes or make the improvements in respect of which the assessment was levied."

Section 3 of the act of Congress, approved August 6, 1890 (26 Stat. 296), being "an act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June 30th, 1891, and for other purposes," above referred to, provides as follows:

> "That hereafter the Commissioners of the District of Columbia are authorized in their discretion to order such of the above enumerated work (improvement and repair of alleys, sidewalks and the construction of sewers and sidewalks) as in their opinion is necessary for the public health, safety and comfort, and to pay the total cost of said work from the appropriations therefor; one-half of the cost of such work so done, including material and labor, shall be charged against and become a lien upon the property abutting upon the line of such improvement and shall be levied pro rata according to the linear frontage of each lot, or part of lot abutting such improvement, within 60 days after making such assessment and in order to reimburse appropriations so expended, one-half of the cost of such work so done, including labor and material, shall be charged against and become a lien upon the property abutting upon the line of the said work and shall be levied pro rata upon said property according to its linear frontage upon such terms and regulations as to notice to the proprietors and the methods and terms of such notice as shall seem to the Commissioners of the District of Columbia right and proper, due notice of such terms and regulations being given by publication thereof in some newspaper published in the city of Washington,

> D. C., for such time as said Commissioners shall prescribe."

Pursuant to the authority contained in the foregoing act of Congress, the Commissioners of the District of Columbia laid the curb and sidewalk in front of the property of the plaintiff in error described in his petition, fronting 60 feet on U street, and assessed one-half of the actual cost of the work, amounting to $65.24, against said lot.

The Act of Congress, Approved August 6, 1890, is Constitutional.

As said by the Court of Appeals of the District of Columbia in deciding this case:

> "At any rate the act of Congress, under which this assessment was made, was not and therefore could not be held to be unconstitutional."

While it is true that act of Congress did not in terms expressly provide for notice to the owners of property to be assessed, it is not invalid for that reason.

It will be observed that this act committed the matter generally to the Commissioners, leaving to them the terms and nature of the notice. Pursuant thereto, the Commissioners made a general order on June 24, 1896, providing that in all cases of reassessment of general taxes and assessments for local improvements, notice by publication should be given in one or more newspapers in the city of Washington, twice a week for two weeks. According to the decision of the Court of Appeals of the District of Columbia and of this court, such a course, under such a law, is a legal exercise of the taxing power.

In Paulsen vs. Portland, 149 U. S. 30, the city of Portland passed an ordinance providing for the construction of a sewer and the assessment of the costs thereof upon lots and blocks within a prescribed district. The validity of

this assessment was challenged because of its alleged unconstitutionality, on the grounds that it determined arbitrarily and absolutely, that the property therein described was benefited without giving the owners of property any notice or opportunity to be heard upon that question, and also on the ground that the ordinance itself provided for the construction of the sewer without providing for any notice to the owners of property to be assessed. It was contended that the act of the legislature providing for an assessment must also, to be valid, provide for some kind of notice to the property holder. Mr. Justice Brewer, delivering the opinion of the court, said:

> "But, were it otherwise, while not questioning that notice to the taxpayer in some form must be given before an assessment for the construction of a sewer can be sustained, as in any other demand upon the individual for a portion of his property, we do not think it essential to the validity of a section in the charter of a city granting power to construct sewers that there should in terms be expressed either the necessity for or the time or manner of notice. The city is a miniature state, the council is its legislature, the charter its constitution; and it is enough if, in that, the power is granted in general terms, for when granted, it must necessarily be exercised subject to all limitations imposed by constitutional provisions and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council. Thus in the case of Gilmore *vs.* Hentig, 33 Kan. 156, it was held that: 'Where a statute authorizes a city to provide for the construction of sewer and drains, and to tax the cost thereof upon the adjacent property owners, but does not require that any notice shall be given to the property owners, held, that such failure to require notice does not render the statute unconstitutional or void, but notice must nevertheless be given, and the city would have a broad discretion with reference to the kind of notice and the manner of giving the same.' See, also, Cleveland *vs.* Tripp, 13 R. I. 50; Davis *vs.*

Lynchburg, 84 Va. 861; Williams *vs.* Detroit, 2 Mich. 560; Gatch *vs.* DesMoines, 63 Iowa, 718; Balt. & Ohio RR. Co. *vs.* Pittsburg W. & K. RR. Co., 17 W. Va. 812, 835."

The Court of Appeals of the District of Columbia, 3 App. D. C. 24, where the same argument was made, said:

> "Many well-argued cases hold that this notice must be provided for in the act which confers the power, and that its omission, therefore, can not be compensated by the fact that the council, board or committee charged with the execution of the law may, of their own motion, provide for notice in the regulations or proceedings, which they may prescribe. Stuart *vs.* Palmer, 74 N. Y. 188; Kurtz *vs.* Sumption, 117 Ind. 1; Ullman *vs.* Mayor of Baltimore, 73 Md. 587."

The court then quotes the decision of the Supreme Court in Paulsen *vs.* Portland, *supra*, and adds:

> "In accordance with the doctrine of the foregoing case [Paulsen *vs.* Portland], it seems that when Congress shall confer the power upon the Commissioners of the District of Columbia to make improvements without the request or consent of the owners of abutting property, and assess a part of the cost against them, *the act itself need not expressly require notice*, provided full discretion is left to the Commissioners in the premises, and in accordance therewith they make public and permanent regulations which shall prescribe a fair, reasonable and uniform mode of giving notice to all parties whose property may be affected."

In Lyman *vs.* Plumer, 75 Iowa, 353, the court said:

> "There is no statute which requires a personal notice, nor is there a statute which requires *any* notice to be given. . . . When the power was conferred on the city to prescribe by an ordinance, the mode, or manner in which the charge for the improvement should be made, it embraced the right

> on the part of the city to do all things necessary to make the assessment a valid charge against the owners of property abutting on the streets. *By necessary implication, the power was conferred on the city to prescribe the notice that should be given. In this respect the city was vested with all the powers vested in the general assembly, and if it was competent for the general assembly to provide that a notice by publication should be given, such power by necessary implication was conferred on the city.*"

While the Court of Appeals has held, and while, perhaps, it is the law, that notice to the owner of property is necessary at some stage of the proceedings before a tax becomes a lien or charge against property, yet the failure to give such notice, if such was the case, would not affect, we assume, the constitutionalty of the act of Congress under which the work was done.

It is contended, however, that this act of Congress imposed upon the abutting property, by the front foot, one-half of the cost of the improvement, without any reference to special benefit, and that it is, therefore, unconstitutional.

As said by this court in Parsons *vs.* District of Columbia, 170 U. S. 45:

> "It is trite to say that general principles announced by courts which are perfectly sound expressions of the law under the facts of a particular case may be wholly inapplicable in another and different case; and there is scarcely any department of the law, in which it is easier to collect one body of decisions and contrast that with another in apparent conflict, than that which deals with the taxing and police powers."

Moreover, in determining the validity of this law, it is important to bear in mind what this court has repeatedly said in relation to the powers of Congress over the District of Columbia.

> "The legislation in question in the present case is

> that of the Congress of the United States and must be considered in the light of the conclusion, so often announced by this court, that the United States possesses complete jurisdiction, both of a political and municipal nature, over the District of Columbia."
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> Parson *vs.* District of Columbia, 170 U. S. 45.

This court has repeatedly sustained the right of the legislative power to determine the amount of taxes to be raised, the property to be assessed, and upon which it is to be apportioned and the rule of apportionment.

In Spencer *vs.* Merchant, 125 U. S. 345, this court had under consideration an act of the Legislature of New York, directing the assessment of the entire cost of the opening of a street together with a proportional part of the expenses of making the assessment, with interest, to be levied upon certain specified property. The Court of Appeals of the State of New York sustained the act and its decision was affirmed by this court. This court, quoting with approval from the decision of the Court of Appeals of the State of New York, said :

> "The act of 1881 determines *absolutely* and *conclusively* the *amount of tax* to be raised and the *property to be assessed*, and upon which it is to be apportioned. Each of these things was within the power of the legislature whose action can not be reviewed in the courts upon the ground that it acted unjustly or without appropriate and adequate reason. The legislature may commit the ascertainment of the sum to be raised and of the benefited district to commissioners, but is not bound to do so, and may settle both questions for itself, and when it does so, its action is necessarily conclusive and beyond review."
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> . . . . . .
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> "The legislature in the exercise of its power of taxation has the right to direct the *whole* or a *part* of the expense of a public improvement, such as the

> laying out, grading or repair of a street, to be assessed upon the owners of lands benefited thereby and the determination of the *territorial district* which should be taxed, for a local improvement is within the province of legislative discretion."

In Hagar *vs.* Reclamation District, 111 U. S. 702, this court said:

> "Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure."

In Cooley on Taxation, page 447, the following conclusions from many authorities are cited:

> "1. The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited.
>
> "2. The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits.
>
> "3. *The whole cost in other cases is levied on lands in the immediate vicinity of the work.*"
>
> "*In a constitutional point of view either of these methods is admissible,* and one may be sometimes just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is *legislative*, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible, arbitrary rule."

In Bauman *vs.* Ross, 167 U. S. 584, this court said:

> "The legislature, in the exercise of the right of taxation, *has the authority to direct the whole, or such*

part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading, or repair of a street, to be assessed upon the owners of lands benefited thereby. Davidson *vs.* New Orleans, 96 U. S. 97; Hagar *vs.* Reclamation District No. 108, 111 U. S. 701; Spencer *vs.* Merchant, 125 U. S. 345; Walston *vs.* Nevin, 128 U. S. 578, 582; Illinois C. RR. Co. *vs.* Decatur, 147 U. S. 190, 198, 199; Paulsen *vs.* Portland, 149 U. S. 30. This authority has been *repeatedly exercised* in the District of Columbia by Congress, with the sanction of this court. Willard *vs.* Presbury, 81 U. S. 676; Mattingly *vs.* Dist. of Col., 97 U. S. 687; Shoemaker *vs.* United States, 147 U. S. 282. . . ."

In Walston *vs.* Nevin, 128 U. S. 578, it was claimed that the act of the General Assembly of Kentucky, so far as it authorized the cost of the improvement of streets and other ways to be assessed against the owners of lots and gave a lien thereon in the manner therein provided, and all the proceedings thereunder, were in conflict with section 1 of the Fourteenth Amendment of the Constitution. The act of the legislature required the cost to be apportioned on the abutting land according to area. Mr. Chief Justice Fuller, in delivering the opinion of the court, quoted the opinion of Mr. Justice Miller in Davidson *vs.* New Orleans, citing Spencer *vs.* Merchant, and confirmed the decision of the court below in favor of the constitutionality of the law.

In Lent *vs.* Tillson, 140 U. S. 316, the question arose as to the validity of an assessment made to meet the cost of widening Dupont street in the city of San Francisco. The law required the value of the land taken and the damages to improvements and all expenses, which should be deemed the cost of widening the street, to be assessed "upon the district hereinafter described as benefited by said widening." The district declared to be benefited was specifically described in the act. This case was elaborately argued by Joseph Choate on behalf of the plaintiff in error, and by

A. H. Garland, solicitor for the defendant. Mr. Justice Harlan, in delivering the opinion of the court, held that the proceedings constituted due process of law and quoted Davidson *vs.* New Orleans and Hagar *vs.* Reclamation District, and said:

> "Tested by these principles the statute providing for the widening of Dupont street can not be held to be repugnant to the constitutional requirements of due process of law."

In the opinion the decision of this court in Spencer *vs.* Merchant was cited with approval. In that case it was specifically argued that the assessment, being on its face in excess of the ascertained benefits, was void under the Constitution.

In Illinois Central Railroad Co. *vs.* City of Decatur, 147 U. S. 190, certain lands of the railroad company were assessed to defray the cost of grading and paving certain streets. While the question involved was whether the company was exempt from local taxation, Mr. Justice Brewer, in delivering the opinion of the court, referred to the decisions of this court and of other courts, with apparent approval, which held in effect that an assessment for improvements made on the basis of frontage of lots upon the street to be improved, is valid.

In Paulsen *vs.* Portland, 149 U. S. 30, it appeared the common council of the city of Portland passed an ordinance for the construction of a sewer, and cast by special assessment the cost thereof upon lots within a prescribed district. The validity of this assessment was challenged by this suit. It was specifically claimed that the law was unconstitutional and void, because the assessment was not imposed according to benefits. Mr. Justice Brewer, in delivering the opinion of the court, said that the law was not in violation of the Fourteenth Amendment.

In Fallbrook Irrig. Dist. *vs.* Bradley, 164 U. S. 112, there was involved the validity of irrigation acts passed by the Legislature of California. It was claimed that the basis of assessment for the cost of construction, as prescribed by the laws, was not in accordance with and in proportion to the benefits conferred by the improvements. This court, in its decision, followed the decision in Spencer *vs.* Merchant and sustained the validity of the act.

In Williams *vs.* Eggleston, 170 U. S. 304, there was drawn in question the validity of a law of the State of Connecticut imposing upon five towns the expense of maintaining a bridge across the Connecticut river at Hartford. In deciding the case Mr. Justice Brewer used this language:

> "Neither can it be doubted that, if the State constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered to be benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory or permit a hearing before itself, one of its committees or any other tribunal as to the question whether the property so included within the taxing district is in fact benefited."

This court has sustained the validity of laws, enacted by Congress, authorizing similar assessments for the same kind of work in the District of Columbia.

In Willard *vs.* Presbury, 14 Wall. 676, a bill was filed by Presbury against Willard and the common council of the city of Washington, to compel Willard to pay a special improvement tax and to restrain the city from collecting it from the complainant. The assessment was made for regrading and repaving F street adjacent to Willard's Hotel. The act of Congress under which the assessment

was made directed the cost of the improvement to be assessed against abutting lots. This court said:

> "Some question has been made by the counsel for the appellee as to the power of Congress to confer upon the city authority to assess upon the adjacent proprietors of lots the expense of repairing streets with a new and different paving or repairing an old one. It is asserted that this should be a general tax on the city, but the power, we think, can not well be denied. The Constitution confers upon Congress the authority to exercise exclusive legislation over this District."

In Mattingly *vs.* District of Columbia, 97 U. S. 687, it appeared that the Board of Public Works constructed a sewer along Seventh street, in the City of Washington and caused the sidewalks to be paved. After the completion of the work they made an assessment of *one-third of its cost* upon the property adjoining *according to its frontage*, and it was claimed that the assessment was illegal and void, because, among other things, assessments according to frontage were illegal. The court, by Mr. Justice Strong, said:

> "It may be that the burden laid upon the property of the complainants is onerous. Special assessments for road or street improvements very often are oppressive, but that the legislative power may authorize them and may direct them to be made *in proportion to the frontage*, area or market value of the adjoining property, at its discretion, is under the decisions, no longer an open question."

In Dillon's Municipal Corporations, Vol. 2, Sec. 752 (4th edition), the conclusions reached are thus expressed:

> "The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power or included within it. . . . Whether the expense of making such improvements shall be paid out of the general treasury

> or be assessed upon the abutting property or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency."

It is claimed, however, that Norwood *vs.* Baker, 172 U. S. 269, is a reversal of the former decisions of this court; and that under no circumstances, can the legislative authority determine what proportion of the cost of a public improvement shall be assessed against the property specially benefited thereby, or the rule of apportionment of such benefit. We do not understand that case, however, as holding or deciding anything contrary to the principle now asserted. The only point in judgment in that case was the validity of a law imposing the *entire cost* of laying out a public street by the front foot upon the land abutting such street by a rule of apportionment which disregarded the actual benefits received. It was an extreme case; one in which it was obvious at first blush that the assessment of such an extent and made under such circumstances, amounted to a taking of property, and was not the valid exercise of the power of taxation. We assume, in view of the repeated decisions of this court, that except for that fact and that had this court regarded the assessment in that case as falling under the head of taxation, even though somewhat in excess of the actual benefit to the property assessed, it would not have interfered.

Davidson *vs.* New Orleans, 96 U. S. 97, 106.
Spencer *vs.* Merchant, 125 U. S. 345, 356.
Walston *vs.* Nevin, 128 U. S. 578, 582.
Fallbrook Irrig. Dist. *vs.* Bradley, 164 U. S. 112, 170.

The actual decision in Norwood *vs.* Baker appears to have

been misunderstood by some courts. The subject is commented upon in the recently published second edition of Elliot on Roads and Streets, pp. 578, 579.

Moreover, in that case, this court emphasized the fact that, in order to carry a levy of a tax outside of the domain of taxation and to bring it within the domain of the taking of property, within the meaning of the Fourteenth Amendment, the exaction must be in *substantial excess of the special benefit*, and that only to *the extent of such substantial excess*, would it be a taking of property. In this case, the property of the plaintiff in error abutted upon an unimproved street; and the public improvements, for which the assessment was made, were an obvious, direct benefit to the petitioner's property; and there is no averment in the petition, and it is not asserted, that the petitioner's property was not in fact actually benefited to the extent of the assessment, or that the assessment was in excess, equal to or even approximated the value of the petitioner's property, but the petitioner relies solely upon the naked, legal, technical objection in reference to the rule of apportionment of benefits resulting. These facts, we respectfully submit, clearly distinguish the case at bar from Norwood *vs.* Baker. The same view was taken by the Court of Appeals of the District of Columbia, which court, in this case, did not regard the opinion of this court in Norwood *vs.* Baker as abrogating or reversing its former decision in that regard.

As was said by the Court of Appeals of the District of Columbia (Rec., pp. 13 and 14):

> "This doctrine, in respect to the power of Congress, generally, to determine the propriety of a public improvement, the lands benefited thereby which may be subjected to special assessment to meet the cost, and the rule of ascertainment, is not overthrown by the recent decision in Norwood *vs.* Baker, 172 U. S. 269. That case, as we understand it, denies only the unlimited discretion of the legislature in the premises, and declares that the sub-

stantial benefits, actually received, constitute the boundary.

"As was said by Mr. Justice Harlan, in delivering the opinion of the majority of the court: 'It is *one thing* for the legislature to prescribe it as a *general* rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and should therefore specially contribute to the cost incurred by the public. It is quite a *different thing* to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum, representing the *whole cost* of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in *substantial excess* of the special benefits accruing to him is, *to the extent of such excess*, a taking under the guise of taxation of private property for public use without compensation.' Idem. p. 279. Parsons *vs.* District of Columbia is not denied, but approved with this qualification of what might else be inferred from the decision: 'If the costs of laying the water mains in question in that case had *exceeded the value of the property* specially assessed, or had been in excess of any benefits received by that property, a different question would have been presented.' Idem., p. 295.

"The authority of the actual decision in the Parsons case remains therefore, unimpaired for this observance. Congress may order a local improvement, designate the property to be assessed on account of special benefits, and prescribe the proportion of the amount, and the rule of ascertainment, without preliminary notice to the owners to appear and be heard in respect of the propriety or character of the improvement, or the designation of the taxing district or area. See, also, Williams *vs.* Eggleston, 170 U. S. 304, 311."

Furthermore, it would seem perfectly apparent from the decision in Norwood *vs.* Baker, that it was not intended to reverse or impair the effect of the previous decisions of this court and particularly its decision in Parsons *vs.* District of Columbia, which came up on appeal from the Court of Appeals of the District of Columbia. On the contrary, this court, in the opinion in Norwood *vs.* Baker, expressly referred to Parsons *vs.* The District of Columbia and distinguished it, and we therefore respectfully submit that this case is controlled by the decision of this court in the Parsons case.

In Parsons *vs.* District of Columbia, 170 U. S. 45, the validity of certain acts of the Legislative Assembly of the District of Columbia and of certain acts of Congress, was assailed, among other reasons, because the act of Congress imposed an assessment without regard to the cost of the work to be done or the value of the improvement and without regard to actual benefits received. In that case, a water main was laid under laws which required an assessment against abutting land, at the rate of $1.25 for each linear foot. It appeared that the total assessment under the law was $2.50 per foot and that the actual cost of the main was $1.50 per foot only. In this case it will be noted the act in question required the assessment according to the front foot of only *one-half* of the cost of doing the work. This court, notwithstanding the fact that the tax levied was in excess of the actual cost of doing the work, sustained the validity thereof.

In Henderson Bridge Co. *vs.* Henderson, 173 U. S. 615, Mr. Justice Harlan, in delivering the opinion of the court, said:

> "But in order to bring taxation imposed by a State or under its authority within the scope of the Fourteenth Amendment of the National Constitution the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt

that such taxation by its necessary operation is really spoliation under the guise of asserting the power to tax. As an act of Congress should not be declared unconstitutional unless its repugnance to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments."

We therefore submit that the act of Congress under consideration is valid.

The Reassessment Act Approved April 24, 1896, is not Unconstitutional, and the Reassessment in this Case was Authorized by That Act and was in Accordance Therewith.

The reassessment act approved April 24, 1896 (29 Stats. 94), provides as follows:

"That the Commissioners of the District of Columbia be, and they are hereby, authorized and directed in all cases where general taxes or assessments for local improvements in the District of Columbia may hereafter be quashed, set aside or declared void by the Supreme Court of said District, by reason of an imperfect or erroneous description of the lot or parcel of ground, against which the same shall have been levied by reason of such tax or assessment not having been authenticated by the proper officer, or of a defective return of service of notice, or for any technical reason other than the right of the public authorities to levy the tax or make the improvement in respect of which the assessment was levied, to reassess the lot or parcel of ground in respect of such general taxes or the improvement mentioned in such defective assessment, with power to collect the same according to existing laws relating to the collection of assessments and taxes: *Provided*, That in cases where

> such taxes or assessment shall be quashed or declared void by said court, for the reasons hereinbefore stated, the reassessment herein provided for shall be made within ninety days after the judgment or decree of said court quashing or setting aside such taxes or assessments and any amount heretofore paid upon an assessment which has been declared void shall be credited the owners upon the reassessment made under the provision of this *bill*" (*sic*).

In this connection, it is proper to observe that on several occasions, the plaintiff in error, in his brief, has referred to the act of Congress approved August 7, 1894 (28 Stats. 247), and particularly on page 9 of his brief, where he states that the notice by publication of the purpose of the authorities to reassess the plaintiff's land was made under the act of Congress approved *August 7, 1894*. As a matter of fact the assessment was made and the sidewalk laid in front of the petitioner's property under the act of Congress approved August 6, 1890, hereinbefore referred to, and the reassessment was made under the act of Congress approved April 24, 1896.

The act of Congress of April 24, 1896, authorizing the reassessment of special improvement and general taxes empowers the Commissioners in all cases where such taxes or assessments are quashed, set aside or declared void by the Supreme Court of the District of Columbia—

> "by reason of an imperfect or erroneous description of the lot or parcel of ground against which the same shall have been levied, by reason of such tax or assessment not having been authenticated by the proper officer, or by a defective return of service of notice, *or for any technical reason other than the right of the public authorities to levy the tax or make the improvement*, in respect of which the assessment was levied, to reassess the lot or parcel of ground in respect of such general tax or the improvement mentioned in the defective assessment, with power to

collect the same according to existing laws relating to the collection of assessments and taxes."

While this statute does not in terms provide for notice to the property owner, in point of fact, sufficient notice of intention to reassess in this case was given by advertisement (Rec., p. 4), and such notice was in pursuance of a general order of the Commissioners, dated June 24, 1896, providing that in all cases of reassessment of general taxes and assessments for local improvements, notice by publication should be given twice a week for two weeks in one or more newspapers in the city of Washington, describing the lot or parcel of land to be reassessed, etc., and fixing a time and place when and where property owners affected might appear and present objections.

It is suggested, however, that the original assessment was quashed by reason of the fact that the Commissioners had no authority or jurisdiction to levy the tax or make the assessment because they proceeded without due process of law and that the assessment was not merely null and void, but that the whole action of the Commissioners was null and void.

The return of the Commissioners set forth in the record, and which, for the purposes of this case, must be taken as true, expressly shows that the assessment was in the first instance quashed "by reason of want of proper notice as required by law," (Rec., p. 5, 6). As said by the Court of Appeals (Rec., p. 15):

> "The reassessment of petitioner, as shown by the record of the proceedings exhibited in the return to the writ, appears to have been regularly made in conformity with the law. The Commissioners provided a rule regulating the giving of notice to the parties interested. That notice was given in this case to the petitioner, to appear and present his objections to the proposed reassessment. The place, day and hour of the hearing were stated in the

> notice. He failed to appear and the Commissioners, after his default, proceeded to assess against his property the amount of one-half of the actual cost of the improvements as ascertained by them. *There is no claim whatever that the amount assessed exceeded the special benefit received from the improvement.* No exception was taken to the return made to the writ in the court below, but objection is now made to its sufficiency because it does not show the particular grounds upon which the first assessment was vacated."

As a matter of fact, as heretofore suggested, the return (Rec., pp. 5, 6) expressly shows that the tax in the first instance was quashed "by reason of want of proper notice as required by law." The court below, proceeding (Rec., pp. 15 and 16) said:

> "At any rate, the act of Congress under which that assessment was made was not, and therefore could not have been held to be unconstitutional. Consequently, the only ground upon which it could have been vacated was the want of the requisite notice or the existence of some other irregularity in the proceeding amounting to a denial of due process of law."

There can be no question that the public authorities had the right to make the improvement, in respect of which the original assessment was levied, and it is equally plain that the intention of Congress was to cure by way of reassessment, original assessments which, for any reason, were defective except only in cases where the Commissioners were without authority to make the improvement itself.

As said by the Court of Appeals in this case (Rec., p. 15):

> "The plain intention of the act seems to be that, where there is a valid law ordering or conferring the right to order an improvement which is within the power of Congress, and imposing or ordering the imposition of a tax therefor, no property owner shall escape the burden by reason of any irregularity in

the original assessment, provided the Commissioners shall, within ninety days from the date of the judgment or decree annulling the same, reassess it in the proper manner."

We therefore submit that the Commissioners were authorized to make this reassessment, by the terms of the act, and that the reassessment was in all respects regular. It follows, therefore, that no doubt can exist as to its validity, if the law itself authorizing the reassessment is constitutional.

No particular reason is pointed out in the brief of the plaintiff in error why Congress can not pass a law requiring the reassessment of a tax, quashed for any technical reason other than the right of the public authorities to levy the tax or make the improvement, in respect of which the assessment was levied. The argument seems to be that the act is unconstitutional because it requires the reassessment of a tax which was levied originally under an unconstitutional law. For the reasons heretofore advanced, however, we submit that the law under which the work was done and the original assessment made, is valid.

The right to pass a reassessment law has been repeatedly exercised in various jurisdictions and the validity thereof repeatedly sustained.

Where at the time of the attempt to levy and assess a tax or assessment, the municipal authorities have jurisdiction of the subject matter, and the acts necessary to be done to acquire jurisdiction and make a valid assessment are prescribed by the statute, and the defect consists in a failure to perform all the acts required, or to perform them or some of them in the mode or within the time required, the legislature has power to legalize the tax or assessment as made, or to authorize a reassessment by providing for the doing of the acts omitted, or by dispensing with the omitted acts, if not necessarily jurisdictional, and making an assessment as originally attempted. Unless controlled by other than

constitutional limitations, the legislature has power within certain exceptions, as where the defect or invalidity is owing to entire failure to acquire jurisdiction in the incipient proceedings, either by direct curative legislation or provision for reassessment, to legalize any tax or assessment which it might have authorized or provided for in the first instance.

Welty on Assessments, 383.
Tefft *vs.* City of Buffalo, 82 N. Y. 204.
Thompson *vs.* Lee County, 3 Wall. 327.
O'Brien *vs.* County Com. of Baltimore, 51 Md. 24.
People *vs.* Mitchell, 55 N. Y. 552.

The original assessment in the case at bar was not invalid because made in violation of any positive law applicable to such proceedings.

There is no pretense in this case that the improvement in respect of which the original assessment was levied was not necessary or proper, or that the mode of proceeding in making the assessment affected the substantial interests of the petitioner.

It has been held that a special tax adjudged to have been levied "without jurisdiction and void" may be reassessed, and the fact that the assessment is made after the improvement has been completed and paid for by the city, and the owners are enjoying the benefit thereof, does not render the assessment unconstitutional.

Howell *vs.* Buffalo, 37 N. Y. 267.

An assessment invalid by reason of a failure to procure the necessary consent in writing of property owners may be reassessed.

In Matter of Van Antwerp, 56 N. Y. 261.

A reassessment may be made where an unconstitutional

assessment for city improvements has been set aside in chancery.

How. Sav. Inst. *vs.* Newark, 52 N. J. L. 1.

Where a special assessment was vacated because contract for paving was illegal and void, the city council not having determined in advance of advertising for bids, the kind and quantity of material, it was held that the tax could be reassessed.

Tuttle *vs.* Polk, 84 Iowa, 12.

The legislature may ratify and cure through reassessment by the local authorities, that which it might have constitutionally and lawfully authorized in the first instance. Whatever in the form and mode of proceedings not going to the ground work and justice of the tax which has failed, the legislature might have dispensed with in the first instance, the same dispensation may be granted afterward. It may dispense with the giving of a notice where that was made necessary, or with the enforcing of work or competition by receiving bids and awarding it to the lowest bidder where that was required, or with other like informalities in the proceedings to make an assessment or levy. These things, though in general very expedient and wise, can not be said to be essential to the exercise of the taxing power.

Dean *vs.* Borchserius, 30 Wis. 247.

As stated by the Court of Appeals, (Rec., p. 15):

> "Where an assessment has been vacated upon such grounds, there can be no doubt of the power of the legislature to provide for a reassessment through a proceeding having due regard to the constitutional rights of the land owner."

The leading case for many years in this court, upon the subject of the assessment of the cost of special improvement,

arose over the reassessment of a special improvement tax which had been set aside for want of proper notice.

Spencer *vs.* Merchant, 125 U. S. 345.

In concluding, we invite the attention of the court to the briefs submitted in the case of Wight et al. *vs.* Davidson et al., No. 283, October Term, 1900, argued early in the present term, wherein is involved the validity of certain acts of Congress requiring the assessment of not less than one-half of the cost of extending certain streets in the city of Washington.

We respectfully submit the judgment of the Court of Appeals of the District of Columbia should be affirmed.

ANDREW B. DUVALL,
CLARENCE A. BRANDENBURG,
Attorneys for Defendant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 102.

ANNA P. HOOVER ALLEN, ANDREW EASTWICK HOOVER, CHARLES P. HOOVER, FANNIE B. BYRNE, ANNIE H. McALLESTER, AND LULU L. THORNTON, HEIRS-AT-LAW OF ANDREW HOOVER, DECEASED, PLAINTIFFS IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

STIPULATION NOT TO PRINT RECORD AND TO ABIDE THE DECISION IN CASE OF JAMES T. WORMLEY v. THE DISTRICT OF COLUMBIA, No. 101 OF OCTOBER TERM, 1900.

D. W. BAKER,
Attorney for Plaintiffs in Error.
A. B. DUVALL,
Attorney for Defendant in Error.

(17,469.)

In the Supreme Court of the United States.

JAMES T. WORMLEY, Plaintiff in Error, *v.* THE DISTRICT OF COLUMBIA. } No. 101.

It is hereby agreed and stipulated that the record in this cause contains materially the same issues as the record in the case of Hoover *et al.*, plaintiffs in error, *v.* The District of Columbia, No. 102, with the exception that in case No. 102 the reassessment is one-third of the alleged cost of the improvement, while in No. 101 the reassessment is one-half of the alleged cost of improvement.

It is further agreed and stipulated that the record in No. 101 be printed, and that the printing of the record in No. 102 be dispensed with, and that said No. 102 abide by the decision in No. 101.

A. B. DUVALL,
Att'y for Def't in Error.
D. W. BAKER,
Att'y for Plaintiffs in Error.

[Endorsed:] File No., 17,469. Supreme Court U. S., October term, 1900. Term No., 102. Anna P. Hoover Allen *et al.*, P. E., *vs.* District of Columbia. Stipulation not to print record, and that this case abide decision in No. 101, Wormley *vs.* District of Columbia. Filed Oct. 17, 1900.

Supreme Court of the United States.

Nos. 101 and 102—October Term, 1900.

James L. Wormley, Plaintiff in Error. *vs.* 101 The District of Columbia.	In error to the Court of Appeals of the District of Columbia.
Anna P. Hoover Allen and others, Plaintiffs in Error. 102 *vs.* The District of Columbia.	

[April 29, 1901.]

Per Curiam: And now, April 29, 1901, the judgments in the foregoing cases are affirmed, with costs, on the authority of *Parsons* v. *District of Columbia*, (170 U. S. 45,) and *French* v. *Barber Asphalt Paving Co.*, (181 U. S. ——.)

True copy.

Test:

Clerk Supreme Court, U. S.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 550.

JOHN L. SHUMATE, PLAINTIFF IN ERROR,

vs.

AUGUST HEMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED JANUARY 28, 1901.

(18,035.)

(18,035.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 550.

JOHN L. SHUMATE, PLAINTIFF IN ERROR,

vs.

AUGUST HEMAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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1 UNITED STATES OF AMERICA, *88:*

The President of the United States to the honorable the judge of the supreme court of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the April term, 1900, thereof, between August Heman, respondent, and John L. Shumate, appellant, a manifest error hath happened, to the great damage of the said John L. Shumate, appellant, as aforesaid, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., not exceeding thirty days from and after the day the citation in this cause bears date, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 21st day of November, in the year of our Lord one thousand nine hundred.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, central division, dated as aforesaid.

{ Seal of the United States Circuit Court for the Western District of Missouri, Central Division. }

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri, Central Division.

Allowed by—
JAS. B. GANTT,
Chief Justice, Supreme Court of Missouri.

[Endorsed:] No. —. United States circuit court, western district of Missouri. August Heman, resp't, *vs.* John L. Shumate, app't. Writ of error to the supreme court of the State of Missouri. Filed Nov. 28, 1900. Jno. R. Green, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *State of Missouri,* } *88:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified tran-

script of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court of the State of Missouri, at the city of Jefferson, this 4th day of December, A. D. 1900.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk.*

2 The United States of America to August Heman, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the supreme court of Missouri, wherein John L. Shumate is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James B. Gantt, chief justice of the supreme court of Missouri, this 28th day of November, in the year of our Lord one thousand nine hundred.

JAMES B. GANTT,
Chief Justice.

[Endorsed:] Supreme court of Missouri. August Heman, resp't, *vs.* John L. Shumate, app't. Citation. Filed Nov. 28, 1900. Jno. R. Green, clerk.

UNITED STATES OF AMERICA,
Central Division of the Western District of Missouri, } *ss:*

I hereby acknowledge due service of the within citation this 1st day of December, A. D. 1900.

HICKMAN P. RODGERS,
Attorney for Defendant in Error.

3 In the Supreme Court of Missouri, Court in Banc, October Term, 1900.

STATE OF MISSOURI, *set:*

Be it remembered that heretofore, to wit, on the 26th day of March, 1900, there was filed in the office of the clerk of the supreme court of the State of Missouri a certified copy of the judgment of the circuit court of the city of St. Louis and an order granting an appeal in a certain cause wherein August Heman was respondent and John L. Shumate was appellant; which said certified copy of judgment and order granting an appeal is in words and figures as follows, to wit:

STATE OF MISSOURI, } ss:
City of St. Louis, }

Be it remembered that heretofore, to wit, at the June term, A. D. 1899, of the circuit court, city of St. Louis, within and for the city and State aforesaid, and on the twelfth day of June, 1899, it being the seventh day of the said June term, 1899, of said circuit court, the following proceedings were had in cause No. 84205 of said court, wherein August Heman is plaintiff and John L. Shumate is defendant, to wit:

AUGUST HEMAN }
vs. } (84205.)
JOHN L. SHUMATE. }

MONDAY, *July 12th*, 1899.

Now, at this day, this cause coming on for hearing, come the parties hereto, by their respective attorneys, and, waiving a jury, submit this cause to the court upon the evidence and proof adduced; and the court, having heard and duly considered the same and being fully advised in the premises, doth find the issues herein joined in favor of the plaintiff, and that the defendant is indebted to the plaintiff in the sum of two hundred and twenty-two and $\frac{17}{100}$ dollars (8222.17) on account of the special-tax bill on which this
4 action is founded.

It is therefore ordered and adjudged and decreed by the court that the following-described property of the defendant, to wit, lot No. 8, in block 3661, of said city of St. Louis, said lot having a front of 50 feet by a depth of 134.67 feet and being bounded on the north by Donohoe, east by Belleglade avenue, south by Puthoff, and west by alley, is subject to the payment of said tax bill, being No. 8689, for work done on Vandeventer Avenue sewer district No. 1, under authority of the city charter and of ordinance- numbered 13076, 13482, 13596, 14625, and 14630 of said city and under contract 1454, and that the said debt so found to be due, being the amount of said tax bill, with accrued interest from the date of commencement of this suit to this date, being the total sum of two hundred and twenty-two and $\frac{17}{100}$ dollars, together with the costs of this suit, is a special and first lien against the said property as hereinbefore described, and that the sheriff of the city of St. Louis proceed to sell said property, according to law, to satisfy said debt, interest, and costs, and that special execution issue herein. It is further ordered by the court that the defendants' cross-bill be, and the same is hereby, dismissed.

And afterwards, at the said June term, 1899, of said court, the following further proceedings were had in said cause, to wit:

AUGUST HEMAN
vs.
JOHN L. SHUMATE ET AL. } (84205.)

SATURDAY, *September 30th*, 1899.

On motion of defendant John L. Shumate, by attorneys, it is ordered by the court that he be granted sixty days' time within which to file his bill of exceptions herein. It is further ordered by the court that said defendant be given ten days' time to present and file appeal bond. The said defendant files herein his affidavit for appeal, and on his motion an appeal is allowed him to the supreme court of Missouri from the judgment herein rendered.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

I, Henry Troll, clerk of the circuit court, city of St. Louis, in and for the city and State aforesaid, do hereby certify that the above and foregoing is a true, full, and complete transcript of the judgment in the above-entitled cause, and showing the term and day of the term, month, and year in which the same was rendered, and also of the order granting an appeal in the said cause, as fully as the same remain of record in my office.

In testimony whereof I have hereunto set my hand and [SEAL.] affixed the seal of said court, at office, in the city of St. Louis, this 16th day of December, 1899.

HENRY TROLL,
Clerk Circuit Court, City of St. Louis.

And afterwards, to wit, on the 27th day of March, 1900, the following proceedings were had in said cause, viz:

AUG. HEMAN, Resp., }
vs.
JNO. L. SHUMATE, App. }

Now, at this day, it is ordered by the court that these causes be advanced and set for hearing in banc at the April term, 1900.

And afterwards, to wit, on the 27th day of April, 1900, there was filed in the office of the clerk of the supreme court of Missouri a copy of the record in the above-entitled cause; which said copy of the record is in words and figures as follows, viz:

6 In the Supreme Court of Missouri, in Banc, April Term, 1900.

AUGUST HEMAN, Respondent,)
vs.) No. —.
JOHN L. SHUMATE, Appellant.)

Record.

On December 31, 1890, there was filed in the office of the clerk of the circuit court of the city of St. Louis a petition in words and figures as follows, to wit:

STATE OF MISSOURI,)
City of St. Louis,) *ss:*

In the Circuit Court, City of St. Louis, Mo., February Term, A. D. 1891.

AUGUST HEMAN, Plaintiff,)
vs.)
JOHN L. SHUMATE, HUNTINGTON SMITH, Defendants.)

Plaintiff states that the defendants are the owners in fee-simple of a lot of ground lying and being situate in the city of St. Louis and State of Missouri, and more particularly described as follows: Lot No. 8, in block 3661, of said city of St. Louis, said lot having a front of fifty feet by a depth of 134.67 feet, and being bounded on the north by Donohoe, east by Belleglade avenue, south by Putthoff and west by alley.

That the municipal assembly of the city of St. Louis, State of Missouri, by ordinances numbered 13076, 13482 and 14625, provided for the creation of Vandeventer Avenue sewer district number 1, in said city as follows: (Said ordinances were not inserted.)

That by ordinance numbered 13596 and 14630, said municipal assembly provided for the construction of sewers in said Vandeventer sewer district as follows: (Said ordinances were not inserted.)

That by and under said ordinances numbered 13076, 13482 and 14625, said Vandeventer Avenue sewer district number 1 was created, and at the times hereinafter mentioned existed, and that the real estate above described was in said Vandeventer Avenue sewer district number 1.

7 That the municipal assembly of the city of St. Louis, Missouri, by said ordinances numbered 13596 and 14630, duly enacted, caused to be constructed and authorized and directed the board of public improvements of the city of St. Louis, to cause district sewers to be constructed within Vandeventer Avenue sewer district number 1, with all the lateral sewers, inlets, man-holes, flush-tanks, junction pieces and other appurtenances necessary to render said sewers complete and efficient, and said sewers to be made and located as described in said ordinances.

That after said ordinances went into effect, the work therein directed to be done was duly advertised, let out and awarded to the plaintiff, who was the lowest bidder therefor, and plaintiff thereafter

duly entered into a contract with the city of St. Louis for the performance of said work, which contract was numbered 1454, and delivered to the city of St. Louis a bond for the faithful performance of said work executed by himself and two good and sufficient sureties, which contract and bond were certified to be in due form and according to law by the city counselor, and were duly approved by the mayor and municipal assembly of said city of St. Louis.

That thereafter plaintiff entered upon the performance of the work directed to be done by said ordinances numbered 13596 and 14650, and duly completed the same, in accordance with law and said ordinances and contract; and the same was duly accepted by the city of St. Louis; that thereafter the president of the board of public improvements computed the costs thereof and levied and assessed the same as a special tax against each lot of ground chargeable therewith, and among others the lot of ground hereinbefore—in the names of the owners thereof respectively, in the proportion

8 that the square feet of each lot in said sewer district bore to the total number of square feet in said sewer district, being all the property chargeable with the special tax aforesaid, and made out and certified to the comptroller on behalf of the contractor bills of such cost and assessment accordingly, and that plaintiff's receipt was taken by the comptroller therefor, and said bills delivered to him.

Plaintiff states that the lot above described was one of the lots in said Vandeventer Avenue sewer district number one, and that it was duly assessed by the president of the board of public improvements, in the proportion aforesaid, with the sum of $98.07 ninety-eight $\frac{7}{100}$ dollars that said president made out a bill of said assessment in the names of the owners of said lot and registered the same in his office, and certified and delivered the same to the comptroller, and took his receipt therefor, and said comptroller countersigned and delivered the same to this plaintiff, in whose favor it was issued; that said bill was dated January 8, 1889, was numbered 8689, and is herewith filed and marked Exhibit "A."

Plaintiff states that he demanded payment of said bill of the owner of said lot prior to the beginning of this suit, to wit: on the 1st day of February, 1889, which was refused.

Wherefore, plaintiff prays judgment for the amount of said bill with interest from February 1, 1889, at the rate of fifteen (15) per centum per annum, and that the same be adjudged a lien on the lot of ground above described, and that said lot be sold to pay the amount of said bill, interest and costs.

T. J. ROWE,
Attorney for Plaintiff.

And at the same time there was also filed the special-tax bill mentioned in said petition and marked "Exhibit A;" which said tax bill is in words and figures as follows, to wit:

Special-tax Bill.

Office of president of board of public improvements.

ST. LOUIS, *January* 8, 1889.

No. 8689. John L. Shumate, owner, to August Heman, contractor, Dr.

For constructing sewers in Vandeventer Ave. sewer district No. 1, under authority of ordinances Nos. 14625, 14630, 13076, 13482, and 13596, and under contract No. 1454.

Boundaries.				Description.				Area square feet in district.	Total cost of sewer.		Rate per 100 square feet.		Area square feet in lot.	Amount.	
North.	East.	South.	West.	No. of block.	No. of lot.	Frontage.	Depth.		Dolls.	Cts.	Dolls.	Cts.		Dolls.	Cts.
Donohoe.	Bellegd. Ave.	Pothoff.	Alley.	3661	8	50.0	134.67	16,706,365	$243,336	09	$1	45655	6,733	$98	07

I hereby certify, that as shown by the certificate of the sewer commissioner, on file in this office, the above-mentioned work was done and material furnished by the above-mentioned contractor. I further certify that the board of public improvements has assessed the cost of the sewers in said district upon the property-owners thereof, according to law; that the rates, or prices and amount, viz., $98.08, are correct, and that the person herein named as the owner of the land, and charged with the bill, is liable to pay the same.

HENRY FLAD,
President of the Board of Public Improvem'ts.

Registered and countersigned:
R. A. CAMPBELL, *Comptroller.*

JOHN L. SHUMATE VS. AUGUST HEMAN.

35064

10 And thereafter, on June 6, 1899, the defendants, by leave of court, filed the following amended answer and cross-bill:

In the Circuit Court, City of St. Louis, State of Missouri.

AUGUST HEMAN, Plaintiff,
vs.
JOHN L. SHUMATE ET AL., Defendants. } No. 84205.

And now come the defendants, John L. Shumate and Huntington Smith, and for answer to plaintiff's petition state as follows, to wit:

Defendants deny each and every allegation in said petition contained, and pray hence to be discharged with their costs.

And for further answer and, by way of a cross-bill to said petition, defendants state and aver that the greater part of the work alleged in the petition, to have been done by plaintiff, and upon which, and for which, said alleged special-tax bill is alleged to have been issued, if done by plaintiff, was done upon the large sewer constructed in an alleged sewer district known as Vandeventer Avenue sewer district number one, and extending from the point of its connection with Mill Creek sewer, a distance of two miles to a point near the Fair grounds in the city of St. Louis.

That said sewer, so constructed in said Vandeventer avenue, was and is of very large dimensions, and was and is a public sewer, within the meaning of section- 20 and 21, article VI, of the scheme and charter of the city of St. Louis, and was and is constructed in a public street, and along a principal natural course of drainage; that said sewer is, as defendants are informed and believe and aver, nowhere constructed in or upon private property.

11 That said Vandeventer Avenue sewer was and is of the mean diameter of eight (8) feet — (6) inches, at its intersection with said Mill Creek sewer, and was intended to be, and is a branch of said Mill Creek sewer, which itself is a public sewer within the meaning of the scheme and charter aforesaid. That said Vandeventer Avenue sewer is of greater capacity than necessary to drain the district proper, in which it is constructed, and was constructed of this great diameter and length for the purpose of receiving and carrying into Mill Creek sewer, by means of private and district sewers, connected with it, not only the sewage and drainage of the district proper in which it is constructed, but also the sewage and drainage of other districts adjacent to it; and the sewage and drainage of not one district only, but of many districts.

The plan and scheme of said Vandeventer Avenue sewer district number 1, so projected by the ordinance creating the same, embraced said main construction of smaller lateral sewers, connecting with the Vandeventer Avenue sewer, in and for the purpose of draining several local subdistricts bordering on said main Vandeventer Avenue sewer by means of district sewers, and said lateral sewers were constructed and connected with and drained into said main sewer; and the cost of constructing said lateral district sewers was not kept separate and assessed against the property in said subdistricts, but was all lumped together and assessed against all the

property, in general, embraced in the general district created by said ordinance as Vandeventer Avenue sewer district number 1, so that the property in one subdistrict was assessed in addition to the cost of the said main sewer with the cost of district sewers in other districts.

12 Defendants aver that said Vandeventer Avenue sewer was not and is not a district sewer, within the meaning of the provisions of the scheme and charter aforesaid. That said Vandeventer Avenue sewer is larger and longer than any district sewer ever heretofore constructed in the city of St. Louis.

While the city council, upon the recommendation of the board of public improvements, had authority to create sewer districts, for the construction of district sewers, it had, and has, no power or authority to create a sewer district for the construction of district sewers, and thereafter to construct or authorize the construction therein of a public sewer, at the expense of the holders of the property, in such district, and has no power or authority to assess the cost of the construction of such sewer against such private property.

Defendants aver that the cost of the construction of said Vandeventer Avenue sewer must and should be paid out of the public revenue, and defendants further aver that the said tax bill sued on herein is, for the above reasons, null and void, and constituted no cause of action against these defendants.

And the defendants further aver that the construction of said Vandeventer Avenue sewer was not authorized either by city ordinance No. 13598, nor by city ordinance No. 14630, as alleged and charged in plaintiff's petition, and defendants further aver that said ordinance No. 14630 is not complete in itself, nor does it, in itself, authorize the construction of the Vandeventer Avenue sewer, nor of the lateral brick sewers referred to in sections 1, 2 and 3 of ordinance No. 13596. That before any work was done on any of said sewers under ordinance No. 13596, the district to which that ordinance was to apply was abolished by the passage of ordinance No. 14625 which was approved on the 17th day of July, 1888, so that before the passage of ordinance No. 14630, the sewer district under which

13 sewers were authorized to be constructed under sections 1, 2 and 3 of ordinance No. 13596 had been abolished and was out of existence, and there was no sewer district then in existence to which the said sections 1, 2 and 3 of ordinance No. 13596 could be applied. And thereupon these defendants aver that the construction of said Vandeventer Avenue sewer and the lateral sewers running into it, referred to in sections 1, 2 and 3 of ordinance No. 13596, were not authorized by either the city council or the board of public improvements. And defendants further state that said ordinance No. 14630, not being complete in itself, is null and void, and that any and all special-tax bills issued thereunder, including the tax bill herein sued upon, are null and void.

Defendants further aver that none of the said ordinances mentioned and referred to in plaintiff's petition were recommended or approved by the board of public improvements as required by the scheme and charter.

And further answering, defendants aver that the lot of ground described in plaintiff's petition was not duly assessed by the board of public improvements in any manner whatsoever with the sum of forty-nine dollars and four cents ($49.04), as alleged in said petition.

That the enforcement and collection of said alleged special-tax bill predicated upon said alleged assessment by the sale of said property claimed to be subject to the same under sections 21, 22, 24 and 25 of article VI of the charter of the city of St. Louis; and the ordinances of the city of St. Louis; numbered 13076, 13482 and 14625; and ordinances of said city numbered 13596 and 14630, which ordinances are set out in plaintiff's petition, would be in fact the confiscation of said property under the claim of exercising the right of taxation, and would be depriving defendants of their said property without due process of law, and would be taking the said property of defendants for public
14 uses, without just compensation, contrary to the provisions of the fourteenth amendment of the Constitution of the United States, and contrary to the provisions of sections 20 and 21 of article II of the constitution of the State of Missouri, and for that reason said provisions of said charter and said ordinances and said assessment and said tax bill are void; and said provisions of said charter and of said ordinance of said city are repugnant to and in conflict with the said provisions of said constitutions for the further reasons that they do not provide for limiting the amount of special taxes for the construction of said sewer to the amount of value, or to the benefits received from said construction by defendants' property so taxed; and for the reason that they do not contain any provision requiring the municipal assembly of said city, or any State or municipal agency to find and determine the extent to which the public of the city of St. Louis would be and were benefited by the said alleged improvement; and contain no provision requiring the said municipal assembly or any other municipal or State agency to find and determine that the property embraced in the taxing district created by said ordinance or that defendants' said property would be benefited by said alleged improvement, or to ascertain the extent to which defendants' said property would be or was benefited over and above the benefit derived from the same improvement by the public, or by the city of St. Louis; and for the reason that the said provisions of the said charter and ordinance provides for the assessment of the cost of the construction of said sewer and sewers against the owners of the property in said alleged district, by apportioning the whole cost of such construction and improvement on the front feet of said property, without regard to the fact that the lots of ground so taxed might be and were of unequal depths; and without re-
15 gard to the fact that if the proporty was benefited at all, over and above the benefit derived by the public, some of the same abutting property would receive greater benefits from the said work than other property in the same district.

These defendants allege that the said special-tax bill, No. 8674, is an apparent lien and constitutes a cloud upon defendants' title to defendants' land, described in the said petition and in said tax bill.

Thereupon, these defendants pray that this court will order, adjudge and decree that the said assessment of the proportionate part of the cost of construction of the said sewer against the defendants' said property, and that the said special-tax bill herein sued on, being number 8674, are null and void and of no effect, and constitute no lien upon defendants' said property, and that said special-tax bill be cancelled and delivered up to these defendants.

HIRAM J. GROVER,
Attorney for Defendants.

Whereupon, the plaintiff, on the same day, filed a reply to said amended answer as follows:

Circuit Court, February Term, 1899.

AUG. HEMAN, Plaintiff,
vs.
JOHN L. SHUMATE and HUNTINGTON SMITH, Defendants. } No. 84205.

Plaintiff for reply to the new matter contained in the amended answer of defendant John L. Shumate denies each and every allegation in said new matter contained.

HICKMAN P. RODGERS,
Attorney for Plaintiff.

16 Thereafter, to wit: on the 12th day of June, 1899, the court having duly heard and considered said cases, rendered the following judgment and decree, to wit:

AUGUST HEMAN
vs.
JOHN L. SHUMATE.

Now at this day, this cause coming on for hearing, come the parties hereto, by their respective attorneys, and waiving a jury, submit the cause to the court upon the evidence and proof adduced; and the court having heard and duly considered the same, and being fully advised in the premises, doth find the issues herein joined in favor of the plaintiff, and that the defendant is indebted to the plaintiff in the sum of two hundred and twenty-two and $\frac{7}{100}$ dollars on account of the special-tax bill on which this action is founded. It is, therefore, ordered, adjudged and decreed by the court that the following-described property of the defendant, to wit: lot No. 8, in block 3611 of said city of St. Louis, said lot having a front of 50 feet by a depth of 134.67 feet, and being bounded on the north by Donohoe, east by Belleglade avenue, south by Potthoff and west by alley, is subject to the payment of said tax bill, being No. 8689, for work done on Vandeventer Avenue sewer district number 1, under authority of the city charter and of ordinances numbered 13076, 13482, 13596, 14625 and 14630, of said city, and under contract 1454, and that the said debt so found to be due being the amount of said tax bill with accrued interest from the date of commencement of

this suit to this date, being the total sum of two hundred and twenty-two and $\frac{17}{100}$ dollars, together with the costs of this suit, is a special and first lien against the said property as hereinbefore described, and that the sheriff of the city of St. Louis proceed to sell said property according to law to satisfy said debt and costs, and that special execution issue herein. It is further ordered by the court that defendants' cross-bill be, and the same is hereby dismissed.

And on the 16th day of June, 1899, within four days from the rendition of said judgments, and at the same term of court, defendant filed his motion for new trial and motion in arrest of judgment, which are fully set forth in the bill of exceptions hereinafter.

17 And afterwards, on the 23d day of June, 1899, the court overruled all of said motions, to which action and ruling defendants then and there duly excepted.

And afterwards, to wit, on the 30th day of September, 1899, at the same term of court, to wit, the June term, 1899, the court made and entered of record the following orders, to wit:

AUGUST HEMAN
vs.
JOHN L. SHUMATE.

On motion of defendant, by attorney, 60 days' additional time is granted defendant to file his bill of exceptions herein, and ten days' time to file his appeal bond. And defendant files an affidavit for appeal, and on his motion an appeal is allowed defendant to the supreme court of Missouri from the judgment heretofore rendered herein.

Said affidavit is as follows, to wit:

In the Circuit Court, City of St. Louis, State of Missouri, Room 6.

AUGUST HEMAN, Plaintiff,
vs.
JOHN L. SHUMATE and HUNTINGTON SMITH, Defendants. } No. 84205.

Affidavit for Appeal.

John L. Shumate, one of the defendants in the above-entitled cause, being duly sworn, upon his oath says that the appeal prayed for by him is not made for vexation or delay, but because he considers himself aggrieved by the judgment and decision of the court.

JOHN L. SHUMATE.

Subscribed and sworn to before me this 28th day of September, 1899.

ARTHUR W. REHFELDT,
[SEAL.] *Notary Public, City of St. Louis, Mo.*

My commission expires Dec. 12th, 1900.

Thereafter, to wit: on the 29th day of November, 1899, and within the time limited therefor, defendants presented the following bill of exceptions, which was thereupon signed, sealed and filed.

AUGUST HEMAN, Plaintiff,
vs.
JOHN L. SHUMATE ET AL., Defendants. } No. 84205.

Appearances: H. P. Rogers, Esq., attorney for plaintiff; Messrs. Grover and Grover, attorneys for defendants.

18 Be it remembered, that on this 6th day of June, 1899, the above-entitled cause came on for a hearing before his honor, Franklin Ferris, presiding as judge over division No. 6, of the honorable circuit court, city of St. Louis, when the following proceedings were had, to wit:

Mr. ROGERS: I dismiss this case as to the defendant, Huntington Smith.

Mr. GROVER: Then I ask leave to file this answer for Mr. Shumate. I was employed by Mr. Smith and understood that Mr. Shumate was a necessary party to the suit.

Mr. ROGERS: I object to the filing of the answer at this late date.

Mr. GROVER: I enter my appearance for Mr. Shumate, and not being in the court-room I think he has the right to file his answer.

The court permitted the answer to be filed as amended.

Mr. ROGERS: I suppose it follows that I have a right to amend my reply?

The COURT: Yes, sir; the answer heretofore filed by Smith is now filed against Shumate, and the answer, as amended, to conform therewith.

AUGUST HEMAN, sworn on his own behalf, testified as follows:

Direct examination by Mr. ROGERS:

Q. State your name, please.

A. August Heman.

Q. You reside in the city of St. Louis?

A. Yes, sir.

Q. Are you familiar with the signature of Henry Flad, who was president of the board of public improvements in 1889?

A. Yes, sir.

Q. Are you familiar with the signature of R. A. Campbell,
19 who was comptroller at the same time?

A. Yes, sir.

Q. I will hand you a special tax bill, dated January 8, 1889, naming John L. Shumate as owner, in the sum of $98.08, being Exhibit "A" in this case, and ask you to state if those are the signatures of Mr. Flad and Mr. Campbell, as president of the board of public improvements and comptroller, respectively, as contained in that tax bill.

A. Yes, sir.

Counsel for defendant objected, as incompetent, irrelevant, and immaterial.

The court overruled the objection.

To which action and ruling of the court defendant, by counsel, then and there duly excepted.

Counsel for plaintiff offered in evidence said tax bill, being dated St. Louis, January 8, 1889, John L. Shumate to August Heman, contractor, for constructing sewers in Vandeventer sewer district No. 1, and mentioning lot 8, block No. 3661, having a front of 50 feet by a depth of 134 and $\frac{61}{100}$, the amount being $98.08; and counsel for plaintiff stating that he also offered said tax bill for the purpose of showing the detailed information contained in the tax bill. Said tax bill is in words and figures as follows, to wit:

(For tax bill see page 15, *ante*.)

Cross-examination by Mr. GROVER:

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. In that petition, you set out the ordinances by numbers under which you allege that the contract was made with you by which you did the work in Vandeventer sewer district, No. 1. Have you got that contract with the city?

A. Unless it is amongst the papers there.

By Mr. GROVER: I gave notice to produce this contract when this case was set for trial, but Mr. Rogers said he did not have it. I simply want to show the fact.

By Mr. ROGERS: I told him I did not have it.

(By Mr. GROVER:)

Q. Have you got the contract?

A. No, sir; not with me.

Q. Have you looked for it?

A. No, sir; I have not. I did not know it was wanted.

Q. Didn't you hear me notify you, I wanted that contract here?

A. Not that I know of; I certainly would have brought it if I knew it was wanted.

Q. Your attorney told me he could not find it.

A. He may have asked the office and they could not find it, being ten years old, and being used in several cases.

Q. Will you look for that contract during the recess, at noon?

A. Yes, sir.

Q. And get it here if you can?

A. Yes, sir; I think it is in the court, in some of the cases that have been tried; very likely in the Loevy case, if the papers can be found.

Q. I will ask, Mr. Heman, if the contract, which you say you have not got with you, followed in its terms the ordinances which you set out in your petition?

A. That I could not say.

By Mr. ROGERS: I object unless it is amended by asking the witness, if he knows.

The COURT: If you are going to have the contract here, it seems to me you better have it.

(By Mr. GROVER:)

Q. Now, Mr. Heman, you did the work personally on that sewer?
A. Yes, sir.
Q. You were present while it was being done?
A. Yes, sir.
Q. You made the contract for the work, and you did the work?
A. Yes, sir.
Q. What was the dimensions of that Vandeventer sewer, at the point of its junction with the Mill Creek sewer?

21 By Mr. ROGERS: I object as immaterial; I base my objection on the provision of the charter which states that the board of public improvements shall recommend the district sewers for sanitary purposes, etc., and the character, dimensions and material of such sewers shall be prescribed and may be changed, diminished, enlarged and extended by the board of public improvements. This charter puts within the board of public improvements expressly the power of determining the dimension of a district sewer or any other sewer in the city of St. Louis, and, as that authority is vested in the board of public improvements it would be no defense to this action to show the actual dimension of that sewer.

The COURT: I consider the evidence competent only to show that it was either a public, district or private sewer; the ministerial acts of the board of public improvements are reviewable but the judicial acts are not.

By Mr. ROGERS: I will frame my objection to meet that point. I contend that the board of public improvements in the city of St. Louis is vested with the power of determining the character of a sewer—whether it is a public, district or private sewer.

The COURT: Why don't you demur and settle that question?

By Mr. ROGERS: It can be settled here.

The court overruled the objection.

(Last question repeated, which is as follows:)

Q. "What was the dimension of that Vendeventer sewer at the point of its junction at the Mill Creek sewer?"
A. Either 8 feet or 8 feet and a half; I don't remember.
Q. What was the dimensions of the Mill Creek sewer at the point of junction?
A. 15 by 15 or 20 feet.
Q. Did you build the Mill Creek sewer?
A. Not that part of it.

22 Q. Was the Mill Creek sewer completed up to the point of junction at the time that this work was done by you?
A. Yes, sir.
Q. It had already been finished?
A. Before I completed this work.

Q. That is not the question; before you began the work under these contracts and these ordinances, had the Mill Creek sewer been completed to that point?

A. Not exactly; it was under construction.

Q. Both works were projected to join at that point?

A. Yes, sir.

Q. Now, how far up Vandeventer avenue did this sewer continue to be of the dimensions that you stated it had to be at its junction with the Mill Creek sewer?

Counsel for plaintiff renewed objection.

By Mr. GROVER: The objection may hold to all the questions; I am willing that that may be done—as to the dimensions, lengths and laterals.

By Mr. ROGERS: I object to this inquiry on the ground that defendant's answer and cross-bill do not state facts sufficient to constitute a cause of action. In the first place, the answer is defective because it makes no allegation of a tender; the defendant owning this property in this sewer district, and getting the value of this sewer, would be bound in a court of equity to tender the reasonable value of the improvements to his part of the property before seeking to defeat the tax bill. In the next place, it is sought to bring out evidence to be taken into consideration by this court to determine whether this is a valid tax bill and which has a bearing on the question of whether or not this is a district sewer; and my contention is that it is without the power of this court to go into that question. This court has no jurisdiction for the reason that the charter vests in the board of public improvements the matter of determining the character of a sewer, that is, whether it be a
23 public or a district sewer. I accept the suggestion of the court that, where matters are vested in the municipal authorities not merely ministerial, the courts have no right to inquire into those acts. I say this is not a ministerial act.

The court overruled the objection.

(Last question repeated, which is as follows:)

Q. Now, how far up Vandeventer avenue did this sewer continue to be of the dimensions that you stated it had to be at its junction with the Mill Creek sewer?

A. I cannot say exactly; somewhere between three hundred and five hundred feet.

Q. Now, at the point where it has to be eight or eight and a half feet in diameter, what was the diameter from that point onward?

Counsel for plaintiff objected further on the ground that this is not the best evidence to be had, and as not having laid the proper foundation for secondary evidence.

The COURT: This man was there and saw it and built it and knows it from original knowledge if he knows at all; if he does not know the dimensions and is testifying from profiles or other evidence it is secondary. But if he is testifying from his own knowledge it is original. I overrule the objection.

(By Mr. GROVER:)

Q. Now, at the point where it had to be eight or eight and a half feet in diameter, what was the diameter from that point onward until the diameter was reduced again?

A. As I say, it was reduced every three or five hundred feet six inches at a time until it got to Morgan street and then I think it decreased quicker; I could not say from memory what the size was.

Q. How large was this sewer—the main sewer, I mean—running along Vandeventer avenue and out Morgan street, which you have just referred to?

24 A. I cannot say that from memory. I don't know unless I looked at the map.

Q. You testified about these matters in the case of Heman *vs.* Handlan?

A. Yes, sir; but that has been five or six years ago.

Q. Well, we have your testimony here and you may refresh your memory if you will? (Handing witness said testimony.)

A. The testimony here is just as I have said (reading): "I cannot say." I say that now; I don't know exactly.

Q. As to the point on Morgan street?

A. Yes, sir; I am not positive, but I think it is six feet.

Q. What is your recollection?

A. I say it may possibly be six feet, but I am not positive.

Q. Now, Mr. Heman, at Morgan street what course did the main branch of that Vandeventer Avenue sewer take?

Counsel for plaintiff objected as immaterial, and further on the ground that the cross-examination is improper from the fact that these questions relate to matters not brought out — the direct examination.

The court overruled the objection.

(Question repeated.)

A. Westward on Morgan.

Q. How far on Morgan did it go?

A. To Sarah.

Q. How far was it from Vandeventer avenue?

A. About 1,000 feet.

Q. Can you approximate the dimensions of the sewer on Morgan street from its intersection with Vandeventer avenue down to Sarah street, or westward to Sarah—approximately what were the dimensions on Morgan street?

A. Somewhere between five and six feet.

Q. Now, at Sarah street what direction did it take?

A. Northward.

Q. How far northward did it run on Sarah street?

A. To a couple of blocks north of Easton avenue; several blocks north.

25 Q. What were the dimensions of it there—from Sarah street at the junction of Morgan street northward to Easton avenue?

A. It decreased as it went along; every five or six hundred feet or a thousand feet it would decrease six inches.

Q. What — the distance from the point at Sarah and Morgan to the — you have just spoken of?

A. I should judge ten feet.

Q. Did the sewer stop there?

A. No, sir; not at Easton.

Q. Where did it go?

A. North of Easton.

Q. How far north of Easton did it go?

A. I think about three or four blocks—somewhere about that.

Q. Well, did it stop there?

A. Yes, sir.

Q. What was the point of stopping, St. Ferdinand street, is it not?

A. I think so.

Q. What was the length of that sewer you have just described from its junction with the Mill Creek sewer to the point of ending at St. Ferdinand street?

Counsel for plaintiff objected as immaterial.

A. I cannot say.

Q. Can't you approximate the number of feet?

A. I could not do it; no, sir; that is pretty hard to do; it is quite a long distance.

Q. Was it two miles?

A. I am not prepared to say.

Q. Was it half a mile?

A. More than that.

Q. Was it over two miles?

A. I don't know; I don't think it was; it might be, but I would not be positive.

Q. Was it between a mile and a half and two miles?

A. I don't know exactly.

Q. Was it over a mile and a half?

A. I don't know that it was; I could not say positively.

Q. Now Mr. Heman, I will ask you some questions in regard to the topographical——

At this point a recess was taken until 2 o'clock p. m. of the same day, when the case was resumed as follows:

26 Cross-examination of Mr. HEMAN by Mr. GROVER continued:

Q. Before the adjournment for the noon recess I was directing your attention to the sewer on Vandeventer avenue, from its junction with the Mill Creek sewer to its northern terminus; I will ask you if the sewer, concerning which you have testified, was not the main stem of the Vandeventer sewer?

Counsel for plaintiff objected on the ground that that is a question to be determined by the ordinance.

The court overruled the objection.

A. I don't know whether you call it the main stem or not.

The COURT: Explain what you mean.

By Mr. GROVER: I endeavored to trace the sewer along its main line, he said, at Morgan street it turns west, and he defined the size and dimensions. I may simplify it by asking this question.

Q. At Morgan street, where the sewer turns west, as you testified, was there not a projection along Vandeventer avenue still towards Easton avenue?

A. Yes, sir.

Q. What was the dimension of that projection along Vandeventer avenue from Morgan street?

A. I don't know.

Q. Was it as large as five feet in diameter, or six feet in diameter?

A. I could not say; I don't know what size it was.

Q. How far north did it go?

A. To Easton avenue.

Q. Can't you remember, Mr. Heman, whether that sewer, as projected north on Vandeventer avenue, from Morgan street, was larger or smaller than the sewer which went west on Morgan?

A. I think it was smaller: it naturally would be.

Q. Now, then, I will return to the question which I started
27 out with. The sewer which you defined before our noon adjournment was the main stem of that sewer, was it not?

A. Yes, sir; I don't know whether you would call it the main stem or not.

Q. It was the largest part of the sewer?

A. Yes, sir; eight feet was the largest.

Q. The largest in diameter?

A. Yes, sir.

Q. I omitted to ask you what was the diameter of the sewer on St. Ferdinand street, where it stopped.

A. That I could not tell without looking at the map: all I know is that I built it according to the plans and specifications and the ordinances given to me from time to time by the sewer department.

Q. You read the ordinances?

A. Yes, sir.

Q. And you made the sewer according to the ordinances?

A. Yes, sir.

Q. Then if the ordinances state what the dimensions of that sewer north on Sarah —, *what* would be the dimension- of the sewer that you constructed?

A. Yes, sir.

Q. Did you follow the ordinances strictly?

A. Yes, sir.

Q. Now, Mr. Heman, *are* you familiar with the ground out there, between Grand avenue and Sarah street, are you not?

A. Yes, sir.

Q. What is the first rise of ground west of Grand avenue?

A. Well, in different localities it is at different places.

Q. Well, take Lindell avenue or Olive street?
A. On Olive street the first rise would be about Sarah street.
Q. It is at Sarah street, is it not?
A. Yes, sir.
Q. Then there is a depression between Grand avenue and Sarah street?
A. Yes, sir.
Q. Now, is Vandeventer avenue at the bottom of that depression?
A. No, sir.
Q. What is the bottom of that depression between Sarah street and Grand avenue?
28 A. Between five hundred and seven hundred feet west of Vandeventer avenue.
Q. Now, is that true all the way from the Mill Creek sewer to Morgan street?
A. It is true from the Mill Creek sewer up to Washington avenue.
Q. How is it north of Washington avenue?
A. North of Washington avenue at the time there was no natural water bed there at all from the fact of its having been built up when this was built, but the natural water bed was about 500 feet west of Vandeventer avenue.
Q. There was a run there?
A. Yes, sir; the water-course.
Q. There was no sewer built along there at that time?
A. No, sir.
Q. Not along the water-course?
A. No, sir.
Q. That water-course crossed private property, didn't it?
A. Yes, sir.
Q. This water-course you have described ran along through private property?
A. Yes, sir.
Q. And in a meandering line?
A. Yes, sir.
Q. Not in a straight line, but meandering?
A. Somewhat—yes, sir.
Q. Now, this sewer, however, that you constructed was along Vandeventer avenue and pursued the old route of that meandering line—of that water-course?
A. Yes, sir.
Q. Now, at Morgan street on Vandeventer avenue, where you took that turn west—where was the lowest point or depression there between Grand avenue and Sarah street?

By Mr. ROGERS: I object to that on cross-examination as being immaterial and having no bearing on whether or not this is a district sewer, my reason being that it is nowhere determined by the charter that a district sewer shall follow a natural water-
29 course or shall not; and again because the matter of locating the main stem of the sewer or any part of the sewer is left to the discretion of the board of public improvements and the municipal assembly.

The COURT: That is the same objection you have been urging all along?

By Mr. ROGERS: Probably the same.

The court overruled the objection.

(Last question repeated, which is as follows:)

Q. Now, at Morgan street at Vandeventer avenue where you took that turn west where was the lowest part or depression there between Grand avenue and Sarah street?

A. Vandeventer avenue.

Q. Then, at some points Vandeventer avenue was the lowest point or depression and at other points it was not?

A. Yes, sir.

Q. Now, Mr. Heman, how far east of Sarah street was this natural run that you spoke of there at Lindell avenue?

A. East of Sarah street?

Q. Yes.

A. About 300 or 400 feet.

Q. The natural rise of ground was Sarah street, west of this intervening run on Lindell avenue?

A. Yes, sir.

Q. Now, I will ask you whether or not that run that you spoke of did not come down from the northwest of Lindell avenue, and cross Lindell avenue and extend due south?

A. No, sir; there were two branches—one went northwest and the other went southeast, and followed along until it struck Washington avenue; the other went due west to Lindell—to Boyle.

Q. But north of Lindell avenue there is no run, as you call it, running directly north and south?

A. Yes, sir; it ran right up to Washington avenue.

Q. Now, north of Washington avenue to Morgan street?

A. There was no depression at all except a depression of the ground; no water-course or anything of that kind.

30 —. Now, Sarah street was still at an elevation at Morgan street; I don't mean at Morgan, but where the sewer struck Sarah street; where was the elevation there along Morgan street, from Morgan street to Sarah—there was an elevation between Vandeventer avenue and Sarah street, was there not?

A. I don't understand your question.

Q. On Morgan street, between Vandeventer avenue (where the sewer turned west), and Sarah street (to which point it ran westward), was there an elevation between Vandeventer avenue and Sarah street?

A. Yes, sir.

Q. At what point?

A. About four or five hundred feet west of Vandeventer avenue.

Q. How far was it from that elevation to Sarah street?

A. About the same distance.

Q. Then there was a depression at Sarah street?

A. Yes, sir.

Q. That was a natural depression, was it?

A. Well, I don't know of any natural depression: the ground was lower than it was in the center of the block.

Q. Now, how far south on Sarah street did that depression or lower ground extend?

A. It did not extend south at all; it elevated as you went south.

Q. Did that depression at Sarah street extend northward?

A. No, sir.

Q. Was there a hill there?

A. No, sir. There was a kind of hill, and when you got over it was a level plain like that floor, but further west again was a ravine—about a thousand feet.

Q. What was the next elevation after Sarah street?

A. You would get almost to Taylor avenue before you got any depression.

Q. Then there was a depression at Sarah street?

A. No, sir; no depression.

Q. What was it?

31 A. Just before you got to Sarah street you get over a hill; then you would get a flat country.

Q. You had to come down that country to get to Sarah street?

A. Yes, sir.

Q. Then the next rise was Taylor avenue?

A. Yes, sir; a very slight rise.

Q. You would have to go north, or you had to cut through an elevation of ground to get to Taylor avenue?

A. Yes, sir.

Q. Then the sewer went north and drained that territory beyond the elevation which intervened between Vandeventer avenue and Sarah street?

A. At parts there was an elevation and other parts there was not.

Q. Now, lateral sewers intervened to this main stem, as I call it, did they not?

A. Yes, sir.

Q. You stated voluntarily here a moment ago that you constructed that sewer in accordance with the ordinances?

A. Yes, sir.

Q. Now, can you tell how many lateral sewers there were emptying into this main stem?

A. No, sir; I could not; not from memory; there are too many of them.

Q. No-, Mr. Heman, can't you approximate the number of inlets or laterals that come into that main sewer?

A. No, sir; I cannot.

By Mr. ROGERS: I object to this question at this time because counsel has laid no foundation for it as yet. He has not defined the boundaries of this sewer district. Now, I take it, the evidence will be immaterial until the court has first had some information as to the boundaries of this district; then after we have the boundaries, it would be proper enough to show the inlets, lateral sewerage, etc., within the district leading to the main stem.

The court overruled the objection.

(Last question repeated.)
A. No, sir.

32 (By Mr. GROVER:)

Q. Were there five?
A. Yes, sir; there were five.
Q. There were not a hundred?
A. I don't know; I would not say.
Q. There were not a hundred and fifty?
A. There might be two hundred and fifty.
Q. You have some idea of how many inlets there were?
A. No, sir.
Q. You have no idea at all?
A. If I stopped to see them and figure them over I could tell exactly, but I do not know from memory.
Q. Is it not a fact that there were over two hundred inlets running into that sewer?
A. I don't know, as I say; I am not positive on that point.
Q. Haven't you lately examined the map in the city hall; didn't I see you examining it?
A. No, sir; I saw you; you were examining it and I came over and looked with you, but I did not examine it for my own purpose; I have not looked at that map for eight or ten years.
Q. Didn't you have a copy of it and lay it on the table and show it to me?
A. No, sir.
Q. What was it you showed me?
A. I may have had a topographical tracing.
Q. Don't you remember yourself and myself examining that tracing?
A. We may have; yes, sir.
Q. Haven't you examined it since?
A. No, sir; I have not examined that tracing; but that is only part of the sewer.
Q. That part went to Morgan street, didn't it?
A. I don't know exactly where it did go up to; the tracing is there—you can see.
Q. Having constructed that sewer according to these ordinances which provided for inlets, you cannot say now to the court whether there was one inlet or two hundred inlets?
33 A. No, sir, not from memory; that would be impossible; I can take the map and count and tell.
Q. Can't you state from memory whether there was one inlet or two hundred?
A. I can state that I know there was more than one, but I cannot state whether there was two hundred.
Q. Would you state there were over a hundred?
A. No, sir; I cannot.
Q. Now, Mr. Heman, can you tell the character of these inlets?
A. Yes, sir.
Q. Tell the court the character; take the first one after leaving

the Mill Creek sewer; what was the character of the first one—the one running from both sides—the one from Sarah, and the one from Grand?

A. There was not any from Sarah.

Q. Well, from the west?

A. The first one was from the east.

Q. Tell us about that?

A. To the best of my recollection it was a brick sewer.

By Mr. RODGERS: Will you state what you mean by an inlet?

By Mr. GROVER: I mean side sewers coming into that main sewer, I don't mean manholes.

WITNESS: There are inlets and manholes.

(By Mr. GROVER:)

Q. I am talking about inlets?

A. No, sir; you are talking about sewers; up the alleys.

Q. What was the first sewer up an alley that came into the Mill Creek sewer?

A. A brick sewer.

Q. What was the size of it at its junction with the Vandeventer sewer?

A. Two by three or two and a half by three, I don't remember which.

Q. That came in from the east?

A. Yes, sir.

Q. A brick sewer?

A. Yes, sir.

Q. How far did it extend from Grand?

A. Only a short ways; perhaps a couple of hundred feet.

34 Q. What was the first sewer that came into that sewer from the west?

A. I think it was a pipe sewer, that was a way up near Olive street.

Q. What was the size of that pipe sewer?

A. I don't know.

Q. What was the kind of pipe?

A. Vitrified sewer pipe.

Q. How far west did that extend?

A. I think it extended to Sarah street.

Q. How many feet?

A. About a thousand feet I should judge.

Q. What was the next sewer that came into that Vandeventer sewer from the east after the first one you have described?

A. I would not be positive about the second—whether it was pipe or brick; it was back of the Laclede stables, but I don't know what it was.

Q. Can you tell the court how many brick side sewers there were coming in from the east?

A. No, sir; not unless I had a map.

Q. Can you tell from the ordinances?

A. No, I don't know that I could.
Q. Would the ordinances show the number of pipe and brick sewers?
A. Yes, sir.

The COURT: What is the purpose of cross-examining about this?
By Mr. GROVER: To see if they were in accordance with the ordinances.
The COURT: He has so stated.

(By Mr. GROVER:)

Q. I will ask you whether you constructed all these side sewers that emptied into the Mill Creek sewer in strict accordance with the dimension and material as defined in the ordinances?
A. Yes, sir.

The COURT: It seems to me the best way is to get the ordinances. His evidence is not very satisfactory; he is guessing a great deal of this.

35 (By Mr. GROVER:)

Q. Mr. Heman, I will ask if you found that contract?
A. No, sir.
Q. Have you looked for it?
A. Yes, sir, and the secretary, he tells me, he has been looking for a week or two.

The COURT: Don't his statement cover that point?

(By Mr. GROVER:)

Q. You state you cannot produce that contract?
A. No, sir, not the original.
Q. What is this paper I hand you (handing witness a paper)?
A. A proposal for sewer work.
Q. That is your bid for that work?
A. In Vandeventer sewer district No. 1.
Q. This is the bid that was accepted?
A. Yes, sir.
Q. And your contract was based on that bid?
A. Yes, sir.
Q. That is your signature?
A. Yes, sir.

Mr. GROVER: I will have to read this as it is a public document and I can read it now or later when I come to offer it. I think I had better simply have it marked as an exhibit.
Said paper was marked for the purpose of identification, Defendant's Exhibit "A."

Q. This bid is signed August Heman and bears date St. Louis, April 28th, 1886, and purports to be a bid to do certain work. I observe that on the endorsement on the back there is a date apparently of its reception, April 27th, 1886; can you explain how this bid purports to have been sent on the 28th of April, 1886, and ap-

pears to have been filed on the 27th with the board of public improvements, do you know anything about that endorsement?

Mr. ROGERS: I object to the question; I cannot understand the purport of it, but it seems to me it makes no defense on account of any informality in the bid.

The COURT: I don't see that it makes any difference; that was the bid that was accepted and acted on.

36 By Mr. GROVER: I withdraw the question.

Redirect examination by Mr. ROGERS:

Q. I believe you said that the main body of this Vandeventer Avenue sewer connected with the Mill Creek sewer, did you not?

A. Yes, sir.

Q. The sewage from the Vandeventer Avenue sewer district number 1 now flows into the Mill Creek sewer?

A. Yes, sir.

Q. Now, you began work, I suppose, at the point where the Vandeventer Avenue sewer connected with the Mill Creek sewer, did you not, and proceeded north?

A. Yes, sir.

Q. Now, in following the course mapped out from the Mill Creek sewer north, please explain to the court, as near as you can, the topography of the ground through which this Vandeventer Avenue sewer passed—I mean this main trunk going north from the Mill Creek sewer?

A. There was an elevation where it went over from Duncan avenue to Washington avenue.

Q. Duncan avenue is the point where it connects with the Mill Creek sewer?

A. Yes, sir.

Q. Between Duncan avenue and Washington avenue, was it necessary for you to make any excavation and to what extent?

A. Yes, sir; we had to excavate all the way; sometimes as high as thirty or thirty-two feet deep.

Q. Now, at other parts of that sewer, what is the depth?

A. In some places it is fifteen and sixteen feet deep.

Q. Then, why was this excavation to a depth of thirty feet or more necessary between Duncan and Washington avenues, along Vandeventer avenue?

A. On account of the elevation.

Q. I will ask you this question: Did this Vandeventer
37 Avenue sewer follow any depression in the ground between Duncan avenue and Washington avenue?

A. No, sir.

Q. What was the lay of the ground between Washington avenue and Duncan avenue through which the sewer at that point passed?

A. The ground was high.

Q. Higher than it was farther west?

A. Yes, sir.

Q. Was it higher at Vandeventer avenue than it was east some distance?

A. No, sir; east it was higher.
Q. But west it was lower?
A. Yes, sir.
Q. Then, the fact is that between Duncan avenue and Washington avenue this Vandeventer Avenue sewer did not follow any depression of the ground?
A. No, sir.
Q. That is not exactly clear that way; did it follow the depression of the ground along there or not?
A. No, sir.
Q. Then, I understand now, with regard to these inlets and lateral sewers, etc., that you do not undertake to state the number from memory?
A. No, sir.
Q. You said something about a depression that was east of Vandeventer avenue and at some point north of Washington avenue—some point, at least, north of Duncan, you spoke of a depression or run that was west.

By Mr. GROVER: You said east awhile ago.
By Mr. ROGERS: Let us take the west first.

Q. You spoke of a run west of Vandeventer avenue and north of Duncan avenue?
A. Yes, sir.
Q. Now explain to the court what you mean by the word "run"?
A. A water-course.
Q. Was the water actually running through that at the time this sewer was constructed?
A. Yes, sir.
Q. How far west of the main trunk of this main sewer?
A. Four or five hundred feet west.
Q. And I believe you said it ran between two sewers—one branch off to the east and one to the west, did you not?
A. No, sir.
38 Q. There were several places along the line of that sewer where you had to make an excavation to a considerable depth, was there not?
A. Yes, sir.
Q. At some points you would make excavations to a much greater depth than you would at other points?
A. Yes, sir.

Recross-examination by Mr. GROVER:

Q. At the point of junction between Vandeventer Avenue sewer and the Mill Creek sewer there was a depression, was there not, in what is called the Mill Creek valley?
A. I don't think Mill Creek valley extends that far.
Q. Some valley does?
A. I don't know.
Q. There was a natural depression where the Mill Creek valley

passes by and crosses Vandeventer and goes west? Don't it have a natural depression?

A. Vandeventer avenue?

Q. No, sir; Mill Creek sewer.

A. No, sir.

Q. There is no natural depression at all?

A. For part of the way there was a depression at Duncan avenue, but it was a little south and west, but there is none there now.

Q. Was the point where the Vandeventer Avenue sewer joins the Mill Creek sewer lower than where the Vandeventer Avenue sewer crosses Washington avenue?

A. I could not say about that.

Q. Was there a gradual decline in the surface?

A. No, sir; from Duncan to Laclede there is quite a rise, I suppose of ten or fifteen feet, and then it comes down.

Q. I am talking of the point where this Vandeventer Avenue sewer strikes the Mill Creek sewer.

A. You asked the question what was the difference between Duncan and Morgan.

Q. No; I said Washington avenue.

A. No, sir; there was a large hill intervening.

39 Q. As a matter of fact, wasn't Washington avenue, at the surface, higher than at the point where the Vandeventer Avenue sewer struck the Mill Creek sewer?

A. No, sir, I don't think so.

Q. Are you willing to testify, positively, that that is not so?

A. No, sir; I could not tell that; but I know there is quite a rise between the two points.

Q. I think I asked you in your cross-examination whether or not that run that you spoke of at certain points west of Vandeventer avenue was not chiefly on private property?

A. Yes, sir.

Q. Now to follow that, the city would have had to condemn the right of way?

Counsel for plaintiff objected. The court sustained the objection. To which action and ruling of the court defendants by counsel then and there duly excepted.

Q. Now, as I understand you, this main stem of the Vandeventer Avenue sewer was on a public highway all the way?

A. Yes, sir.

Q. That is the fact, is it?

A. Yes, sir.

Q. It did not cross private property anywhere?

A. Not to my knowledge.

Q. Now, the ordinances under which you were working fixed the depth of that sewer at different points?

Counsel for plaintiff objected.

A. No, sir.

Q. Do the specifications fix the depth?
A. No, sir.
Q. What does?
A. The engineer and sewer commissioner.
Q. And it was not in your contract and was not in the ordinances and not in the specifications?
A. No, sir.
Q. The city engineer did that?
A. Yes, sir.
Q. You followed his instructions?
A. Yes, sir.
Q. Who was the city engineer at that time?
40 A. Mr. McMath was; the sewer commissioner took the place of engineer.
Q. I have no doubt he is capable, but was he the official engineer at that time?
A. He was considered such.

The COURT: Who gave him the instructions, is the question, I suppose.

(By Mr. GROVER:)

Q. I want to know who the engineer was?
A. I think Mr. Milner was engineer in charge.
Q. Are you sure?
A. I think so, but I would not be positive; it is ten years ago; it is pretty hard to remember so long ago.

(By Mr. ROGERS:)

Q. I understand you to say then, that between Duncan and Washington along Vandeventer there was a hill and that this sewer ran under it?
A. Yes, sir.

The COURT: I wish to say that I propose to be a little more strict on the rule requiring counsel to finish their examination, there is a tendency to think of something afterwards in general. The result is the witness is crossed from one counsel to the other; and I will caution you to finish your examination and then in rebuttal the examination must be confined to matters in rebuttal.

By Mr. ROGERS: I only introduced the tax bill in one case, the other evidence will apply to one as much as the other.

The COURT: I understood you were to try the cases together.

By Mr. ROGERS: I propose to offer the tax bill in the Allen case afterwards. The stipulation was this: The evidence adduced here regarding this situation was to apply as much to the case against Allen as to the case against Shumate, but I am trying now only the case against Shumate.

41 The COURT: You may proceed as you please.

Mr. GROVER: I understood that he would offer both tax bills and prove them by Mr. Heman, his witness, and that my cross-examination would apply to both cases.

The COURT: Your cross-examination does apply to both cases.

By Mr. GROVER: So that with reference to the tax bill it applies in the other case the same as this.

The COURT: Yes, sir; all evidence so far taken by you and to be taken and to be put in hereafter, applies to both cases. He has, however, completed his evidence in one case only.

Plaintiff rested here.

Evidence in Behalf of Defendant-.

Defendants — sustain the issues by them to be sustained introduced the following evidence:

EMORY S. FOSTER, sworn on behalf of defendant-, testified as follows:

Direct examination by Mr. GROVER:

Q. What is your name?

A. Emory S. Foster.

Q. What is your occupation?

A. Secretary of the board of public improvements of the city of St. Louis.

Q. How long have you been secretary of the board of public improvements?

A. Since the fall of 1881.

Q. Then you were the secretary of the board at the time the ordinances were passed creating the Vandeventer Avenue sewer district number 1, and at the time the ordinances were passed which directed the construction of a sewer in that district?

A. Yes, sir.

Q. Does the board of public improvements keep records?

A. Yes, sir.

Q. Written records?

A. Yes, sir.

42 Q. Are you the custodian of those records?

A. I am.

Q. Have you got certain of the books of record here?

A. I have.

Q. I have heretofore, Mr. Foster, asked you to look up certain records in regard to the ordinances referred to, and to produce the records here, and I will ask if you have made that examination and if you have those records here?

A. I have; that is, I have the records of the passage of all the ordinances in the case.

Q. I will ask you to turn to the record showing the passage of the first ordinance which had for its purpose the creation of the sewer district known as Vandeventer Avenue sewer district number 1?

A. I find it in volume 10 of the official records of the board, page 507.

Q. Under what date?

A. Under date of November 11, '84.

Preceding the passage of the ordinance and the introduction of the ordinance, there is a report from the sewer commissioner relating to this sewer.

Q. Please read it.

(Witness read from said record as follows:)

"The sewer commissioner returned communication of the board of health recommending as a sanitary measure that district sewers be constructed in the district bounded east by Grand avenue, west by Goode avenue, north by McPherson and Easton avenue- and south by Manchester road, in the following report:

"'The request of the board of health can be substantially complied with by the creation of a large district embracing all the territory which would be drained by a sewer on Vandeventer avenue, the construction of such a sewer in such a district would occupy two years of which the first was spent in constructing the main sewer on Vandeventer avenue; this construction to be carried on simultaneously with that of the Mill Creek sewer and
43 so be made available for use. During the same year legal proceedings to open the necessary alleys in the district could be completed. I therefore recommend reference to the committee on sewers with instructions to submit an ordinance establishing Vandeventer sewer district No. 1, an ordinance providing for the construction of the sewers therein when the sewer district is established.

"'(Signed) ROBERT E. McMATH,

"'*Sewer Commissioner.*

"'St. Louis, November 11th, 1884.'"

Q. Is that all of that record?

A. (Reading:) "On motion the matter was referred to the committee on sewers with instructions as recommended," then comes another concerning the ordinance. (Continuing to read:) "Committee on sewers submitted an ordinance entitled 'An ordinance to establish Vandeventer Avenue sewer district No. 1.' The ordinance was adopted and recommended to the municipal assembly by the following vote: Ayes—Commissioners Turner, McMath, Wigel, Alt, and President Flad, 5; noes—none; absent—Commissioner Whitman, 1."

Q. Is there any record there showing the estimate?

A. No, sir.

Q. That is simply the creating of the district?

A. Yes, sir.

By Mr. GROVER: I direct the attention of the court to the fact that that is a sanitary measure and that it is not based on the fact of any benefit to the property-holders.

By the COURT:

Q. Are you able to give the number of the ordinance to which you refer?

A. No, sir. The numbering of the ordinance is done after the adoption.

(By Mr. GROVER:)

Q. What was done with that ordinance as recommended by the board?

A. It was forwarded by the president to the municipal assembly with the statement that the board recommended its adoption,
44 giving the vote. I don't speak of that from exact memory, but from a knowledge of the custom which has been in use and which has never been changed in the office. The next I find is in volume 12 of the Official Record of the Board, page 178, dated November 23, 1885. (Reading:) "Committee on sewers submitted the following-named ordinance, to wit: 'An ordinance to provide for the construction of sewers in Vandeventer Avenue sewer district No. 1.' Estimate of cost to property-owners, $250,000. On motion the estimate of cost thus submitted by the committee was adopted as the estimate of the board. The ordinance was adopted and recommended to the municipal assembly by the following vote: Ayes—Commissioners Whitman, McMath, Wigel, and Alt and President Flad, 5; noes—none; absent—Commissioner Turner, 1." I have another ordinance here, but I made a mistake of the minute I made of it in the office. This should come first before the other, it is the same date.

Q. Please read it with the explanation you have made?

A. (Reading:) "Committee on sewers submitted an ordinance entitled, 'An ordinance to amend ordinance No. 13076, entitled An ordinance to establish Vandeventer Avenue sewer district No. 1, approved December 20th, 1884.' The ordinance was adopted and recommended to the municipal assembly by the following vote: Ayes—Commissioners Turner, Whitman, McMath, Wigel and Alt and President Flad, full six. Noes—none. Afterwards Commissioner Turner withdrew." Then the one I read first on this date.

Q. As I understand you, then, on that day you produced a record showing that the original ordinance, creating the district, was amended?

A. Yes, sir; that was amended on November the 23rd.

Q. Then on the same day——

45 A. (Interrupting.) The ordinance was adopted for constructing sewers.

Q. Constructing in that district, a sewer?

A. Yes, sir.

Q. Now, what is your next record?

A. The next record in order of time is in the same volume, 12, Official Record of the Board, page 432, dated April the 7th, 1886: "The sewer commissioners submitted the following communication:

'ST. LOUIS, *April 7th*, 1886.

Honorable board of public improvements.

GENTLEMEN: I request that a day be set for the letting out of the following work'"——

Q. (Interrupting.) I will ask only for the record of this sewer.

A. That is simply the letting of this work.

Q. That is all right, then, if pertaining to this sewer?

A. Yes, sir. (Continuing to read:) "'For the construction of sewers in Vandeventer Avenue sewer district No. 1, embracing 2,848 feet of eight and a half foot diameter brick sewer; 508 feet of eight and a quarter foot diameter brick sewer; 361 feet of eight foot diameter brick sewer; 395 feet of seven and three-quarters — diameter brick sewer; 1,490 feet of six and a half foot diameter brick sewer; 654½ feet of six and a quarter foot diameter brick sewer; 575 feet of six foot diameter brick sewer; 402 feet of five and a half foot diameter brick sewer; 436 feet of five and a quarter foot diameter brick sewer; 516 feet of four and three-quarters foot diameter brick sewer; 879 feet of four by five foot diameter brick sewer; 714 feet of three and a half by four and a half foot diameter brick sewer; 647 feet of three by four foot brick sewer; 909 feet two and a half by three and a half foot diameter brick sewer; 11,884 feet of two by three foot diameter brick sewer; 15,022 feet of eighteen-inch vitrified clay pipe sewer; 17,490 feet fifteen-inch vitrified clay pipe sewer; 36,010 feet twelve-inch vitrified clay pipe sewer; 500 feet six-inch
46 *clay* vitrified clay-pipe sewer. Deposit required, $12,650.

Respectfully submitted.

ROBERT E. McMATH,
Sewer Commissioner.'

On motion, the president was directed to let the work mentioned in the foregoing communication, and April 28th, 1886, at 12 o'clock m., was set for opening bids thereunder by the following vote: Ayes—Commissioners McMath, Wigel and Alt and President Flad, 4. Noes—none. Absent—Commissioners Turner and Whitman, 2."

Q. Now, Mr. Foster, turn to the record of that letting?

A. Same book, page 467, dated April the 28th: "The following bids for public work were received and publicly opened and read, viz: Under letting No. 1726, eight bids which were referred to the committee on sewers, with instructions to report tomorrow at 12 o'clock m." Then, same book, page 473, dated April 28th, 1886: "Committee on sewers submitted the following report:

'ST. LOUIS, *April 29th*, 1886.

Hon. board of public improvements.

GENTLEMEN: Your committee on sewers hereby report that the accompanying tabular statement is a correct account of all the proposals received for the work of constructing sewers in Vandeventer Avenue sewer district No. 1, under letting No. 1726, and also certify that the lowest proposal under said letting is that of August Heman for $240,572, and recommend that the contract be awarded to him.

Respectfully,

(Signed) ROBERT E. McMATH,
THOMAS J. WHITMAN, AND
HENRY FLAD,
Committee on Sewers.'"

Then follows the tabular statement.

Q. Of the bids?

A. Showing the prices bid by all the bidders and the sum bid.

(By Mr. ROGERS:)

Q. Read it.

A. (Reading:) "Letting No. 1726, sewer department, St. Louis, April 28th, 1886. Abstract of proposals for constructing
47 sewers in Vandeventer Avenue sewer district No. 1. Bid of Fruin-Bambrick Construction Co., $283,652.05; Allen & Veaths, $267,618.75; William Skrainka, $264,550.30; August Heman, $240,572; Brewster & Co.—(I cannot read it).

The COURT: Let it go as Brewster.

(Witness, continuing:) "$247,527.70; G. Evermann, $265,282.90; John Bambrick, $280,788; G. Prendergast, $266,019.60." On motion, the report was approved and the contract awarded to August Heman, as recommended by the following vote: Ayes—Commissioners McMath, Wigel and Alt and President Flad, 4. Noes—none. Absent—Commissioners Turner and Whitman, 2.

(By Mr. GROVER:)

Q. I will ask you this question: Can you state from the face of the bids, which you have referred to there, whether or not these bids were for the work in bulk or in subdivision?

A. Subdivision.

Q. Read clear across of Mr. Heman?

A. (Reading:) "Earth excavation, one hundred and ten thousand two hundred cubic yards, 30 cents per cubic yard; rock excavation, 7,000 cubic yards, $2 per cubic yard; rubble masonry, 350 cubic yards, $3 per cubic yard; brick masonry, 16,100 cubic yards, $7 per cubic yard; 12-inch pipe, 36,010 linear feet, 80 cents per linear foot; 15-inch pipe, 17,490 feet, 90 cents per linear foot; 18-inch pipe, 15,022 linear feet, $1.25 per linear foot; 6-inch junctions, 6,060 pieces, 50 cents a piece; 9-inch junctions, 10 pieces, $1 a piece; 12-inch junctions, 137 pieces, $1.50 a piece; 15-inch junctions, 14 pieces, $1.50 a piece; inlet stone, 7,100 square stone, 70 cents; cast iron, 209,600 pounds, 3 cents per pound; wrought iron, 24,600 pounds, 5 cents per pound; concrete in place, 100 cubic yards, $4 per cubic yard; nine-inch pipe, ten feet, 50 cents per foot; 6-inch pipe, 500 feet, 50 cents per foot; 18-inch junctions, 13 pieces, $2 a piece."

48 Q. Now, in the other bids the footings which you have read were made under the same subjects?

A. Yes, sir; in the tabular statement, the same.

Q. Now, turn to your next record in that connection, Mr. Foster—you have Mr. Heman's bid, which I have produced here?

A. Yes, sir.

Q. You brought that in?

A. Yes, sir.

Mr. GROVER: In this connection I offer in evidence Mr. Heman's bid, identified by himself and Mr. Foster.

Mr. ROGERS: We object as immaterial. There is nothing said in the answer about the bid and there is no question raised by the pleadings; I object to it.

The court overruled the objection.

Said paper referred to having been marked Defendant's Exhibit "A" was here read in evidence, and is in words and figures as follows, to wit:

Proposal for Sewer-work.

Letting No. 1726.

To the honorable board of public improvements.

GENTLEMEN: The undersigned herewith propose to do all the work necessary in the construction of sewers in Vandeventer Avenue sewer district No. 1, advertised as letting No. 1726, in accordance with the printed form of contract and specifications for said work, and upon acceptance of these proposals, to execute in the form aforesaid articles of agreement for the same for the following prices, to wit:

For earth excavation, per cubic yard, thirty cents ($30–000).

For rock excavation, per cubic yard, two dollars ($2.00).

For rubble masonry, per cubic yard, three dollars ($3.00).

For brick masonry, per cubic yard, seven dollars ($7.00).

For twelve-inch pipe sewers, per foot, linear, complete, eighty cents ($80–100).

49 For fifteen-inch pipe sewers, per foot, linear, complete, ninety cents ($90–100).

For eighteen-inch pipe sewers, per foot, linear, complete, one 25–100 dollars ($1.25).

For six-inch junctions laid, each fifty cents ($50–100).

For nine-inch junctions laid, each, one dollar ($1.00).

For twelve-inch junctions laid, each, one 50–100 dollars ($1.50).

For fifteen-inch junctions laid, each, one 50–100 dollars ($1.50).

For inlet stone, per square foot, furnished and set, seventy cents ($70–100).

For cast iron in inlets and manholes, per lb., three cents ($03–100).

For wrought iron in inlets and manholes, per lb., five cents ($05–100).

For concrete in place, per cubic yard, four dollars ($4.00).

For nine-inch pipe sewers, per foot, linear, complete, fifty cents ($50–100).

For six-inch pipe sewers, per foot, linear, complete, fifty cents ($50–100).

For eighteen-inch junctions laid, each, two dollars ($2.00).

Messrs. Fred. Heman and Wm. Heman have agreed to become securities in case the contract is awarded to the undersigned. Enclosed is a certificate from the treasurer, that there has been deposited with him twelve thousand six hundred and fifty dollars; which sum is to be forfeited to the city if the party or parties making this proposal fail to enter into contract, with approved securities

within three days after the contract is awarded to said party or parties.

Respectfully,

(Name of bidder:) AUGUST HEMAN,
(Address:) 509 *Chestnut St.*

St. Louis, April 28, 1886.

NOTE.—Every proposal must conform strictly to the requirements contained in the following sections of art. 9, chap. 32 of the Revised Ordinances of 1881, otherwise it will be rejected as informal.

SEC. 3. Each bid for such work shall be written on a blank
50 to be furnished by the board of public improvements; shall be placed in a sealed envelope addressed to "President of the board of public improvements," endorsed "Proposals for public work," with the number of the letting for which the bid is made; and said bid shall not be opened before the day and hour fixed in the notice.

SEC. 4. Each bid shall be signed by the bidder, who shall state in his bid the names of the persons who will become his sureties in case the contract shall be awarded to him.

SEC. 11. If, in any bid, blanks are not properly filled up so as to make a bid complete, and without any ambiguity as to its intent and meaning; or, if a bid has any alteration or erasure upon it; or, if it be not properly signed; or, if the certificate of the treasurer, that the necessary deposit has been made, does not accompany said bid, then said bid shall be rejected.

(To avoid ambiguity, bidders are requested to write the prices in letters and figures.)

By Mr. ROGERS: I object on the general rule of practice that any matters of fact upon which the defendant relies to defeat the tax bill and destroy its validity should be set out in the answer; I find nothing in the answer relating to this bid; I cannot understand why the bid is offered; as there is nothing in the answer that raises any issue on this point the evidence would be immaterial.

The court overruled the objection.

(By Mr. GROVER:)

Q. Now, Mr. Foster, proceed to the next record.

A. I have not found my memorandum, I have the next ordinance, I think that is the next.

Q. Well, we have got down to the point of letting this contract?

A. Yes, sir.

Q. What is the date of that?

A. I gave that—volume 16 of the official records, page 63, of date June 12, 1888. (Reading:) "The sewer commissioner sub-
51 mitted the ordinance hereinafter named, to wit: An ordinance to amend ordinance No. 13482, entitled An ordinance to amend ordinance No. 13076, entitled An ordinance to establish Vandeventer Avenue sewer district No. 1. Approved December 20, 1884; approved January 29, 1886." That is the first ordinance.

(Again reading:) "An ordinance to amend ordinance No. 13596, entitled An ordinance to provide for the construction of sewers in Vandeventer Avenue sewer district No. 1; approved March 16, 1886; estimate of cost to property-owners, $250,000." The estimate of cost as submitted to the commissioner was adopted as the estimate of the board, and the ordinances were adopted as recommended to the municipal assembly by the following vote in each case: Ayes—Commissioners Turner, Holman, McMath, and Murphy, and President Flad, 6: noes—none.

Q. Now, Mr. Foster, those are the records of all the ordinances pertaining to the construction of this Vandeventer Avenue sewer No. 1.

Q. Now, will you turn to the record—the first record which your book shows—of any proceeding by the board with reference to that matter after the work was done?

A. I am looking for that; that is, the report of the sewer commissioner of the completion of the work and his acceptance. I have it now, same volume, No. 16, official records of the board, page 356, of date December 11, 1888.

(Reading:)

"The sewer commissioner submitted the following report:

ST. LOUIS, *December* 11, 1888.

I hereby certify that August Heman has completed the work embraced in his contract No. 1454 for the construction of sewers in Vandeventer sewer district No. 1, as shown on the accompanying diagram (the diagram I have not here—that is filed in the special-tax department), and that we have accepted same in accordance with the specifications and stipulations of his said contract. I have also
52 caused the said work to be carefully measured and the whole cost thereof to be computed according to the terms of the contract and hereby report that the amount is $243,336.09, and in figures as shown in detail by the statement hereto attached.

(Signed) ROBERT E. McMATH,
Sewer Commissioner."

Now follows the statement made in the form of an account:

"Computation No. 254 (that is the serial number) of the whole cost of sewers in Vandeventer Avenue sewer district No. 1, constructed by August Heman under contract No. 1454, under ordinances Nos. 13406, 13464, 13596, and 14632.

First, brick sewer eight and a half feet in diameter, 2,848 feet in length; brick sewer eight and a quarter feet in diameter, 508 feet in length; brick sewer eight feet in diameter, 361 feet in length; brick sewer seven and three-quarters feet in diameter, 597 feet long; brick sewer six and a half feet in diameter, 1,521 feet in length; brick sewer six and a quarter feet in diameter, 630 feet in length; brick sewer six feet in diameter, 583 feet in length; brick sewer five and a half feet in diameter, 402 feet in length; brick sewer four

and a half by six, 436 feet in length; brick sewer four by five and a half, 514 feet in length; brick sewer four by five, 929 feet in length; brick sewer three and a half by four and a half, 690 feet in length; brick sewer three by four, 565 feet in length; brick sewer two and a half by three, 893 feet in length; brick sewer two and a half by three, 11,371 feet in length; total length of brick sewers, 22,848 feet in length. Pipe sewers eighteen inches in diameter, 13,975 feet in length; pipe sewers fifteen feet in diameter, 17,731 feet in length; pipe sewers twelve inches in diameter, 33,850 feet in length; total length of pipe sewers, 65,556 feet in length; total length of brick and pipe sewers, 88,404 feet; 283 inlets and 337 manholes. Work completed December 1, 1888."

53 Each one of these lengths of brick and pipe sewers is given with all the particulars following in several pages.

Q. I will ask Mr. Foster what is your definition of the inlets, the 283 in number mentioned?

A. I am not able to give that information; I simply keep the record and I don't know what it means; however the action of the board referred to the president the matter of making out the necessary tax bill.

Q. That is all?

A. That is all of that particular record. Bills were brought in, if you will allow me a few minutes—I have it now—same book, vol. 16, page 413 of date Jan. 8, 1889. (Reading:) "The president submitted special-tax bills for the construction of sewers in Vandeventer Avenue sewer district, on August Heman, under contract number 1454, and ordinances numbers 13076, 13482, 13625, 14596, 14630, approved by the following vote: Ayes, Commissioners Holman, McMath, —— Murphy and President Flad, 6. Noes—none."

Q. Mr. Foster, have you found in the records of that board of public improvements any evidence of any other act on the part of the board or of its officers looking to the assessment of the cost of the construction of Vandeventer sewer, save and except those entries you have read?

A. Those are the entries I have found; I have not looked to find others; those are the records made.

Q. Those are all you know of?

A. Yes, sir.

Q. Are those records all you have found showing any action by the board, or any of its executive officers, looking to and having for its purpose the assessment of the cost of construction of this sewer against the property-holders or against any one else?

A. Yes, sir.

Q. You have produced the entire record?

A. Yes, sir.

54 Q. Now, Mr. Foster, have you found any record of any action of the board of public improvements determining whether or not the public was benefited in any way by the construction of Vandeventer sewer?

Counsel for plaintiff objected.

The court sustained the objection.

To which action and ruling of the court defendants, by counsel, then and there duly excepted.

Q. Have you any record?

A. I know of no entries.

Q. I will ask you, Mr. Foster, if you have in your custody any records showing any act of the board of public improvements, or of its officers, assessing any part of the cost of the Vandeventer Avenue sewer against the public of the city of St. Louis?

A. I have no such record. Unless the city of St. Louis might own lots in that district.

Q. Then it would be assessed like any other property?

A. Yes, sir.

Q. But, otherwise, there is nothing showing any assessment of any part of this construction against the city of St. Louis.

A. No, sir.

Cross-examination waived.

By Mr. GROVER: I offer in evidence the ordinances of the city of St. Louis, which are set out and alleged in the petition of the plaintiff in this case.

By Mr. ROGERS: Are those the ordinances set out in the answer?

By Mr. GROVER: Yes, sir. There might be some error in the typewriting but the ordinances I refer to are those in the answer and petition.

Mr. ROGERS: I make no objection if they are set out in the answer but the fact that they are set out in the petition is not sufficient ground to introduce them in evidence.

The COURT: Make your offer.

Mr. GROVER: I offer them in evidence. Ordinance of the
55 city of St. Louis creating the Vandeventer Avenue sewer district No. 1, and ordinance of the city of St. Louis directing and authorizing the construction of sewers in that district, which ordinances are set out and referred to in plaintiff's petition, and are as follows:

Creating the sewer district, ordinances numbers 13076, 13482 and ordinance 14625; ordinance of the said city providing for the construction of a sewer in that district so created, being ordinances numbers 13596 and 14630.

The court overruled the objection.

Said ordinances are in words and figures as follows, to wit:

(13076.)

An ordinance to establish Vandeventer Avenue sewer district number one.

Be it ordained by the municipal assembly of the city of St. Louis, as follows:

SECTION 1. There is hereby established in the city of St. Louis a

sewer district to be known as Vandeventer Avenue sewer district number one, bounded as follows, to wit: Beginning at a point in the centre line of Duncan avenue, where the same intersects the east line of Forest Park Boulevard addition; thence northwardly along the east line of Forest Park Boulevard addition, and said east line produced, to the centre of Laclede avenue; thence eastwardly along the centre line of Laclede avenue to a point 660 feet west of Grand avenue; thence northwardly and parallel to Grand avenue to the centre of Pine street; thence eastwardly along the centre line of Pine street to the centre of Grand avenue; thence northwardly along the centre line of Grand avenue to the centre of Lindell avenue; thence westwardly along the centre line of Lindell avenue to the west line of Grand avenue; thence northwardly along the west line of Grand avenue to the centre of Olive street, thence eastwardly along the centre line of Olive street to the centre of Grand avenue, thence northwardly along the centre line of Grand avenue to the centre line of Washington avenue
56 produced as said Washington avenue is laid out west of Grand avenue, thence westwardly along the centre line of Washington avenue to a point 370 feet west of Grand avenue, thence northwardly and parallel to Grand avenue to the centre of Delmar avenue, thence eastwardly along the centre line of Delmar avenue to the centre of Grand avenue, thence northwardly along the centre of Grand avenue to a point 150 feet south of the prolongation of the south line of Morgan street, formerly known as Hogan avenue, thence westwardly and parallel to Morgan street to a point 150 feet west of Grand avenue, thence northwardly and parallel to Grand avenue, and 150 feet west thereof to a point 150 feet north of Bell avenue, thence eastwardly and parallel to Bell avenue to the centre of Grand avenue, thence northwardly along the centre line of Grand avenue to the centre of Finney avenue produced, thence westwardly along said centre line of Finney avenue to the centre of Spring avenue produced, thence northwardly along said centre line of Spring avenue to the centre of Cook avenue; thence westwardly along the centre line of Cook avenue to the centre line of Prairie avenue produced, thence northwardly along said centre line of Prairie avenue and along the east line of ground claimed and occupied by the Citizens' Railway Company, and said east line produced, to the centre of Easton avenue, thence westwardly along the centre line of Easton avenue to the centre line of Sarah street produced, thence northwardly along the centre line of Sarah street to the centre line of St. Ferdinand avenue, thence westwardly along the centre line of St. Ferdinand avenue as established by ordinance number 12849 to the centre of Bell Glade avenue, thence northwardly along the centre line of Bell Glade avenue to the centre of the continuation of St. Ferdinand avenue as established by ordinance number 12849, thence westwardly along the centre line of St. Ferdinand avenue, as so established to the centre of Whittier street, thence southwardly along the centre line of Whittier street to the centre line of North Market street produced, thence westwardly along said centre line of North Market street to

the centre of Goode avenue, thence southwardly along the centre line of Goode avenue and said centre line produced, to the
57 centre of Easton avenue, thence westwardly along the centre line of Easton avenue to a point 25 feet west of the prolongation of the east line of lot 57 of Gregory's addition to Ellcardsville, thence southwardly and parallel to the east line of said lot 57 to the centre of a proposed east-and-west alley 20 feet wide in city block number 3728, thence to and southwardly along the line between lots 21 and 22 of block nine of Evans place to the north line of Evans avenue, thence eastwardly along the north line of Evans avenue to a point opposite the division line between lots 30 and 31 of block four of Evans place, thence to and southwardly along the lines between lots 30 and 31, 16 and 17 of said block four to the north line of Page avenue, thence eastwardly along the north line of Page avenue to a point opposite the dividing line between lots 34 and 35 of Beardslee's subdivision, thence to and southwardly along the dividing lines between lots 34 and 35, 48 and 49 of said subdivision and said lines produced to the centre of Cook avenue, thence to and southwardly along the dividing lines between lots 19 and 20, 34 and 35 of Grand addition to the centre line of Finney avenue, thence eastwardly along the centre line of Finney avenue to a point 934 feet and 6 inches west of Sarah street, thence southwardly and parallel to Sarah street to the centre of Bell avenue, thence eastwardly along the centre line of Bell avenue to the centre of Sarah street, thence southwardly along the centre of Sarah street to the centre of Westminister place, thence eastwardly along the centre of Westminister place to the west line of Vandeventer avenue, thence southwardly along the west line of Vandeventer avenue to the centre of Duncan avenue, thence eastwardly along the centre line of Duncan avenue to the place of beginning.

Approved Dec. 20, 1884.

(13482.)

An ordinance to amend an ordinance number 13076, entitled "An ordinance to establish Vandeventer Avenue sewer district number one," approved December 20, 1884.

58 Be it ordained by the municipal assembly of the city of St. Louis, as follows:

SECTION 1. Ordinance number 13076, entitled, "An ordinance to establish Vandeventer Avenue sewer district number one," approved December 20, 1884, is hereby amended by striking out section one of said ordinance and inserting in lieu thereof the following:

SECTION 1. There is hereby established, in the city of St. Louis a sewer district, to be known as Vandeventer Avenue sewer district number one, bounded as follows, to wit: Beginning at a point in the center line of Duncan avenue, where the same intersects the east line of the Forest Park Boulevard addition, thence northwardly along the east line of the Forest Park Boulevard addition; thence northwardly along the east line of Forest Park Boulevard addition and said east line produced to the centre of Laclede avenue, thence

eastwardly along the centre line of Laclede avenue to a point 600 feet west of the west line of Grand avenue; thence northwardly and parallel to Grand avenue to the centre of Pine street; thence eastwardly along the centre line of Pine street to a point 300 feet west of the west line of Grand avenue, thence northwardly and parallel to Grand avenue to the centre of Washington avenue; thence westwardly along the centre line of Washington avenue to a point 370 feet west of the west line of Grand avenue; thence northwardly and parallel to Grand avenue to the centre line of Delmar avenue; thence eastwardly along the centre line of Delmar avenue to the centre of Grand avenue; thence northwardly along the centre line of Grand avenue to a point 150 feet south of the prolongation of the south line of Morgan street, formerly known as Hogan avenue; thence westwardly and parallel to Morgan street to a point 150 feet west of the west line of Grand avenue, thence northwardly and parallel to Grand avenue to a point 150 feet north of the north line of Bell avenue, thence eastwardly and parallel to Bell avenue to the centre of Grand avenue, thence northwardly along the centre line of Grand avenue to the centre of Finney avenue produced; thence westwardly along said centre line of Finney avenue to the centre of Spring avenue
59 produced; thence northerly along said centre line of Spring avenue to the centre of Cook avenue; thence westwardly along the centre line of Cook avenue to the centre line of Prairie avenue produced; thence northwardly along said centre line of Prairie avenue and along the east line of ground claimed and occupied by the Citizens' Railway Company and said east line produced to the centre of Easton avenue; thence westwardly along the centre line of Easton avenue to a point 260 feet west of the west line of Warne avenue; thence northwardly and parallel to Warne avenue to the centre of Lucky street; thence westwardly along the centre line of Lucky street to the centre of Sarah street; thence northwardly along the centre line of Sarah street to the centre of St. Ferdinand avenue; thence westwardly along the centre line of St. Ferdinand avenue, as established by ordinance number 12849, to the centre of Belleglade avenue; thence northwardly along the centre line of Belleglade avenue to the centre of the continuation of St. Ferdinand avenue, as established by ordinance number 12849; thence westwardly along the centre line of St. Ferdinand avenue, as so established and as laid out in Robert Wash's estate subdivision, and in subdivision of the Wash estate to a point 525 feet west of the west line of Goode avenue; thence southwardly and parallel to Goode avenue to the south line of the subdivision of the Wash estate, thence eastwardly along the south line of said subdivision of the Wash estate to the centre of Goode avenue; thence southwardly along the centre line of Goode avenue and said centre line produced to the centre of Easton avenue; thence westwardly along the centre line of Easton avenue to the centre line of Pendleton avenue, and said centre line produced to the centre of Cook avenue; thence eastwardly along the centre line of Cook avenue to a point 300 feet west of the east line of Grand addition, and in the prolongation of the dividing line between lots 25 and 26 of said Grand *division*;

thence southwardly along the dividing line between said lots 25 and 26 and along the line between said Grand addition and Finney Avenue addition and said line produced to the centre line of Finney avenue; thence eastwardly along the centre line of Finney avenue
60 to a point 964 feet and 6 inches west of Sarah street; said point being in the centre line produced by Whittier street, as established by ordinance number 13020; thence southwardly with the centre line of Whittier street and said line produced to the centre of Belle avenue; thence eastwardly along the centre line of Belle avenue to a point 601 feet 6 inches west of the west line of Sarah street; thence southwardly and parallel to Sarah street to the centre of Morgan street; thence eastwardly along the centre line of Morgan street to the centre of Sarah street, thence southwardly along the centre line of Sarah street to the centre of proposed Westminster place; thence eastwardly along the centre line of proposed Westminister place to a point in the west curb line of Vandeventer avenue; thence southwardly along said west curb line of Vandeventer avenue to the centre of Duncan avenue, and thence eastwardly along the centre line of Duncan avenue to the place of beginning."

Approved January 29, 1886.

(14625.)

An ordinance to amend ordinance number 13482, entitled "An ordinance to amend an ordinance number 13076, entitled 'An ordinance to establish Vandeventer Avenue sewer district number one,'" approved December 20, 1884; approved January 29, 1886.

Be it ordained by the municipal assembly of the city of St. Louis, as follows:

SECTION 1. Ordinance number 13482, entitled, "An ordinance to amend an ordinance number 13076, entitled, 'An ordinance to establish Vandeventer Avenue sewer district number one,'" approved December 20, 1884, approved January 29, 1886, is hereby amended by striking out section 1 of said ordinance and inserting in lieu thereof the following:

SECTION 1. There is hereby established in the city of St. Louis a sewer district to be known as Vandeventer Avenue sewer district number one, bounded as follows, to wit: Beginning at a point
61 in the center line of Duncan avenue where the same intersects the east line of Forest Park Boulevard addition; *thus* northwardly along the east line of Forest Park Boulevard addition, and said east line produced to the center of Laclede avenue; thence eastwardly along the center line of Laclede avenue to a point 660 feet west of the west line of Grand avenue; thence northwardly parallel to Grand avenue, and 660 feet west of the west line thereof to the center of Pine street; thence eastwardly along the center line of Pine street to a point 300 feet west of the west line of Grand avenue; thence northwardly parallel to Grand avenue, and 300 feet west of the west line thereof to the center of Washington avenue; thence westwardly along the center line of Washington avenue to a point 370 feet west of the west line of Grand avenue; thence north-

wardly, parallel to Grand avenue and 370 feet west of the west line thereof, to the center of Delmar avenue; thence eastwardly along the center line of Delmar avenue to the center of Grand avenue; thence northwardly along the center line of Grand avenue to a point 150 feet south of the prolongation of the south line of Morgan street, formerly known as Hogan avenue; thence westwardly, parallel to Morgan street and 150 feet south of the south line thereof, to a point 150 feet west of the west line of Grand avenue; thence northwardly, parallel to Grand avenue and 150 feet west of the west line thereof, to a point 150 feet north of the north line of Bell avenue; thence eastwardly, parallel to Bell avenue and 150 feet north of the north line thereof, to the center of Grand avenue; thence northwardly along the center line of Grand avenue to the center of Finney avenue produced; thence westwardly along said center line of Finney avenue to the center of Spring avenue, produced; thence northwardly along said center line of Spring avenue to the center of Cook avenue; thence westwardly along the center line of Cook avenue to the center of Prairie avenue produced; thence northwardly along said center line of Prairie avenue, and along the east line of ground claimed by the Citizens' Railway Company and said east line produced, to the center of Easton avenue; thence westwardly along the center line of Easton avenue to a point 260 feet west of the west line of
62 Warne avenue produced; thence northwardly parallel to Warne avenue, and 260 feet west of the west line thereof, to the center of Lucky street; thence westwardly along the center line of Lucky street to the center of Sarah street; thence northwardly along the center line of Sarah street to the center of St. Ferdinand avenue; thence westwardly along the center line of St. Ferdinand avenue, as established by ordinance number 12849, to the center of Belleglade avenue; thence northwardly along the center of Belleglade avenue to the center of the continuation of St. Ferdinand avenue, as established by ordinance number 12849; thence westwardly along the center line of St. Ferdinand avenue, as so established and as laid out in Robert Wash's estate subdivision and in subdivision of the Wash estate, to a point 525 feet west of the west line of Goode avenue; thence southwardly parallel to Goode avenue, and 525 feet west of the west line thereof, to the south line of the subdivision of the Wash estate; thence eastwardly along the south line of said subdivision of the Wash estate to the center of Goode avenue; thence southwardly along the center line of Goode avenue and said center line produced to the center of Easton avenue; thence westwardly along the center line of Easton avenue to the center of Pendleton avenue produced; then southwardly along the center line of Pendleton avenue, and said line produced, to the center of Cook avenue; thence eastwardly along the center line of Cook avenue to a point 300 feet west of the east line of Grand addition, and in the prolongation of the dividing line between lots 25 and 26 of said Grand addition; thence southwardly along the dividing line between said lots 25 and 26, and along the line between said Grand addition and Finney Avenue addition, and said line produced, to the center of Finney avenue; thence eastwardly along the center line of Finney

avenue to a point 964 feet and six inches west of the west line of Sarah street, said point being in the center line produced of Whittier street, as established by ordinance number 13020; thence southwardly with the center line of Whittier street and said line produced to the center of Bell avenue; thence eastwardly along the center line of Bell avenue to a point 601 feet and 6 inches west of
63 the west line of Sarah street; thence southwardly parallel to Sarah street, and 601 feet and 6 inches west of the west line thereof, to the center of Morgan street; thence eastwardly along the center line of Morgan street to the center of Sarah street; thence southwardly along the center line of Sarah street to the center of Olive street; thence eastwardly along the center line of Olive street to the west curb line of Vandeventer avenue; thence southwardly along the said west curb line of Vandeventer avenue to the center of Duncan avenue; and thence eastwardly along the center line of Duncan avenue to the place of beginning.

Approved July 17, 1888.

(13596.)

An ordinance to provide for the construction of sewers in Vandeventer Avenue sewer district number one.

Be it ordained by the municipal assembly of the city of St. Louis, as follows:

SECTION 1. The board of public improvements is hereby authorized and directed to cause district sewers to be constructed within Vandeventer Avenue sewer district number one, with all the lateral sewers, inlets, manholes, flush-tanks, junction pieces, and other appurtenances necessary to render said sewers complete and efficient. Said sewers shall be made and located as described in the following sections of this ordinance.

SEC. 2. Main sewers made of brick, laid in hydraulic cement mortar, shall be built in Vandeventer avenue, Morgan street, Sarah street, Easton avenue, Lucky street, and Whittier street, as follows: First, a sewer eight feet and six inches in mean diameter from the center of Duncan avenue northwardly in Vandeventer avenue to the alley established by ordinance number thirteen thousand one hundred and eighty-four, in city block number thirty-nine hundred and twenty-six, between proposed Westminster place and Olive street. Second, a sewer eight feet and three inches in mean diameter from the sewer last described, northwardly in Vandeventer avenue to the alley in city block number forty-five hundred and eighty-four. Third, a sewer eight feet in mean diameter from the sewer last described,
64 northwardly in Vandeventer avenue to the alley in city block number thirty-seven hundred and fifty-one. Fourth, a sewer seven feet and nine inches in mean diameter from the sewer last described, northwardly to Morgan street. Fifth, a sewer four feet and six inches in mean diameter from the sewer last described, northwardly in Vandeventer avenue to Bell avenue. Sixth, a sewer four feet in mean diameter from the sewer last described, northwardly in Vandeventer avenue to the alley in city block number thirty-seven

hundred and forty-seven. Seventh, a sewer three feet and six inches in mean diameter from the sewer last described, northwardly in Vandeventer avenue to Finney avenue. Eighth, a sewer three feet in mean diameter from the sewer last described, northwardly in Vandeventer avenue to the alley in city block number thirty-seven hundred and thirty-nine. Ninth, a sewer two feet and six inches in mean diameter from the sewer last described, northwardly in Vandeventer avenue to the alley in city block number thirty-seven hundred and thirty-four. Tenth, a sewer six feet and six inches in mean diameter, from the seven-feet-nine-inch sewer in Vandeventer avenue at Morgan street, before described, westwardly in Morgan street to Sarah street. Eleventh, a sewer six feet and three inches in mean diameter from the sewer last described northwardly in Sarah street to the alley in city block number forty-five hundred and sixty-five. Twelfth, a sewer six feet in mean diameter from the sewer last described northwardly in Sarah street to the alley in city block number thirty-seven hundred and forty-two. Thirteenth, a sewer five feet and six inches in mean diameter from the sewer last described northwardly in Sarah street to the alley in city block number thirty-seven hundred and forty-one. Fourteenth, a sewer five feet and three inches in mean diameter from the sewer last described northwardly in Sarah street to the alley in city block number thirty-seven hundred and thirty-three. Fifteenth, a sewer four feet and nine inches in mean diameter from the sewer last described northwardly in Sarah street to the alley in city block number thirty-seven hundred and thirty-two. Sixteenth, a sewer four feet and six inches in mean diameter from the sewer last described northwardly in Sarah street to
65 Easton avenue, eastwardly in Easton avenue to Sarah street, and again northwardly in Sarah street to the alley in city block number thirty-six hundred and fifty-nine, established by ordinance number thirteen thousand one hundred and ninety-one. Seventeenth, a sewer four feet in mean diameter from the sewer last described northwardly in Sarah street to Lucky street and westwardly in Lucky street to the alley in city block number thirty-six hundred and sixty-two, established by ordinance number thirteen thousand one hundred and ninety-four. Eighteenth, a sewer three feet and six inches in mean diameter from the sewer last described westwardly in Lucky street to the alley in city block number thirty-six hundred and sixty-one, established by ordinance number thirteen thousand one hundred and ninety-five. Nineteenth, a sewer three feet in mean diameter from the sewer last described westwardly in Lucky street to Whittier street and northwardly in Whittier street to the alley in city block number thirty-six hundred and eighty. Twentieth, a sewer two feet and six inches in mean diameter from the six-feet-six-inch sewer in Morgan street, at Sarah street, before described, southwardly in Sarah street to the alley in city block number thirty-seven hundred and fifty-two.

SEC. 3. Sewers shall be built in the east and west alleys in city blocks number thirty-nine hundred and eighteen east, and thirty-nine hundred and nineteen east, as follows: First, sewers two feet and six inches in mean diameter, made of brick laid in hydraulic

cement mortar, from the main sewer in Vandeventer avenue eastwardly to the east line of Forest Park Boulevard addition.

SEC. 4. Sewers shall be built in the east and west alleys in city block number thirty-nine hundred and twenty-eight, and nineteen hundred and fifty-nine, as established by ordinances numbered twelve thousand eight hundred and forty-seven and thirteen thousand one hundred and seventy-nine, and in Cabanne street as follows: First, a sewer two feet and six inches in mean diameter, made of brick laid in hydraulic cement mortar, from the main sewer in Vandeventer avenue eastwardly four hundred feet. Second,
66 a sewer eighteen inches in diameter, made of vitrified clay pipe, from the brick sewer last described eastwardly for a distance of five hundred feet. Third, a sewer fifteen inches in diameter, made of vitrified clay pipe, from the eighteen-inch pipe sewer last described eastwardly to the centre of Cabanne street. Fourth, sewers twelve inches in diameter, made of vitrified clay pipe, from the fifteen-inch pipe sewer last described eastwardly about three hundred feet; also in Cabanne street from Pine street to Laclede avenue.

SEC. 5. Sewers shall be built in the east and west alley in city block number thirty-nine hundred and twenty-seven, as established by ordinance number thirteen thousand one hundred and eighty-one, and in the alleys in city block number nineteen hundred and sixty, as follows: First, a sewer two feet and six inches in mean diameter, made of brick laid in hydraulic cement mortar, from the main sewer in Vandeventer avenue eastwardly seven hundred and twenty feet. Second, a sewer eighteen inches in diameter, made of vitrified clay pipe from the brick sewer last described eastwardly five hundred feet. Third, a sewer fifteen inches in diameter, made of vitrified clay pipe from the eighteen-inch pipe sewer last described eastwardly four hundred feet. Fourth, sewers twelve inches in diameter, made of vitrified clay pipe from the fifteen-inch pipe sewer last described eastwardly to the north and south alley in city block number nineteen hundred and sixty, and southwardly in said north and south alley to Pine street.

SEC. 6. Sewers shall be built in the alleys in city block number thirty-nine hundred and twenty-five, as established by ordinance number thirteen thousand three hundred and twenty-two; in McPherson avenue, in proposed Westminster place, and in Cabanne street, as follows: First, a sewer eighteen inches in diameter, made of vitrified clay pipe from the main sewer in Vandeventer avenue eastwardly four hundred and forty-five feet. Second, a sewer fifteen inches in diameter, made of vitrified clay pipe from the eighteen-inch pipe sewer last described eastwardly to the north and south
alley in said city block number thirty-nine hundred and
67 twenty-five; and in said north and south alley northwardly to proposed Westminster place. Third, sewers twelve inches in diameter, made of vitrified clay pipe in proposed Westminster place from the fifteen-inch pipe sewer last described eastwardly to Cabanne street and southwardly in Cabanne tsreet to Lindell ave-

nue, also in McPherson avenue, from the main sewer in Vandeventer avenue eastwardly about four hundred and sixty feet.

SEC. 7. Sewers shall be built in the east and west alley in city block number thirty-nine hundred and twenty-six, as established by ordinance number thirteen thousand one hundred and eighty-four, and in the east and west alley in city block number nineteen hundred and sixty-one, as follows: First, a sewer two feet and six inches in mean diameter, made of brick laid in hydraulic cement mortar, from the main sewer in Vandeventer avenue eastwardly five hundred and eighty feet. Second, a sewer eighteen inches in diameter, made of vitrified clay pipe from the brick sewer last described eastwardly six hundred feet. Third, a sewer fifteen inches in diameter, made of vitrified clay pipe from the eighteen-inch pipe sewer last described eastwardly three hundred and ten feet. Fourth, a sewer twelve inches in diameter, made of vitrified clay pipe from the fifteen-inch pipe sewer last described eastwardly about four hundred and sixty feet.

SEC. 8. Sewers shall be built in Olive street and Washington avenue, as follows: First, sewers eighteen inches in diameter, made of vitrified clay pipe from the main sewer in Vandeventer avenue eastwardly in Olive street eight hundred and ten feet, and in Washington avenue eastwardly from said main sewer seven hundred and seventy feet. Second, sewers fifteen inches in diameter, made of vitrified clay pipe from the eighteen-inch pipe sewer on Olive street above described eastwardly seven hundred feet, and from the eighteen-inch pipe sewer in Washington avenue above described, eastwardly seven hundred and fifty feet. Third, sewers twelve inches in diameter, made of vitrified clay pipe from the fifteen-inch pipe sewers in Olive street and Washington avenue above described, eastwardly about four hundred and forty feet.

68 SEC. 9. Sewers shall be built in the east and west alleys in city blocks number thirty-seven hundred and fifty-one and twenty-two hundred and eighty-eight south, and in Delmar avenue, as follows: First, a sewer eighteen inches in diameter made of vitrified clay pipe from the main sewer in Vandeventer avenue, eastwardly in the east and west alley in city block number thirty-seven hundred and fifty-one, a distance of six hundred and seventy feet. Second, a sewer fifteen inches in diameter made of vitrified clay pipe from the eighteen-inch pipe sewer last described eastwardly six hundred feet. Third, sewers twelve inches in diameter made of vitrified clay pipe from the fifteen-inch pipe sewer last described eastwardly five hundred and fifty feet, and from the main sewer in Vandeventer avenue eastwardly in Delmar avenue three hundred and fifty feet.

SEC. 10. Sewers shall be built in the east and west alleys in city block number thirty seven hundred and fifty, as established by ordinance number thirteen thousand one hundred and eighty-seven, in the alleys in city block number twenty-two hundred and eighty-eight north, as established by ordinance number thirteen thousand and two, and in Cabanne street, as established by ordinance number eleven thousand eight hundred and fifty-two, as follows: First,

a sewer eighteen inches in diameter made of vitrified clay pipe from the main sewer in Vandeventer avenue eastwardly to Cabanne street. Second, a sewer fifteen inches in diameter made of vitrified clay pipe from the eighteen-inch pipe sewer last described eastwardly five hundred feet. Third, sewers twelve inches in diameter made of vitrified clay pipe from the fifteen-inch pipe sewer last described, eastwardly to the north and south alley in city block numbered twenty-two hundred and eighty-eight, north and southwardly in said north and south alley to Delmar avenue, and in Cabanne street from the eighteen-inch pipe sewer above described southwardly to Delmar avenue.

SEC. 11. Sewers shall be built in Morgan street, Bell avenue and Cabanne street, as follows: First, sewers two feet six inches
69 in mean diameter, made of brick laid in hydraulic cement mortar from the main sewer in Vandeventer avenue eastwardly four hundred and seventy-five feet in Morgan street, and four hundred and ninety feet in Bell avenue. Second, sewers eighteen inches in diameter made of vitrified clay pipe, from the brick sewers above described eastwardly to Cabanne street. Third, sewers fifteen inches in diameter, made of vitrified clay pipe from the eighteen-inch pipe sewers last described, eastwardly in Morgan street two hundred and fifty feet, and in Bell avenue three hundred and ten feet, and in Cabanne street from the eighteen-inch pipe sewer above described in Morgan street; from Morgan street northwardly about two hundred and seventy feet. Fourth, sewers twelve inches in diameter, made of vitrified clay pipe, eastwardly from the fifteen-inch pipe sewer above described in Morgan street, about seven hundred feet, and from the fifteen-inch pipe sewer above described in Bell avenue eastwardly about six hundred feet.

SEC. 12. Sewers shall be built in the east and west alley in city blocks number thirty-seven hundred and forty-seven and thirty-seven hundred and nine, and in Saint Alphonsus street, as follows: First, a sewer two feet and six inches in mean diameter, made of brick, laid in hydraulic cement mortar from the main sewer in Vandeventer avenue, eastwardly in above said alley seven hundred and thirty feet. Second, a sewer eighteen inches in diameter, made of vitrified clay pipe, eastwardly from the brick sewer last described six hundred and fifty feet. Third, a sewer fifteen inches in diameter, made of vitrified clay pipe, eastwardly from the eighteen-inch pipe sewer last described to Saint Alphonsus street. Fourth, a sewer twelve inches in diameter, made of vitrified clay pipe, in Saint Alphonsus street, from Bell avenue to Finney avenue.

SEC. 13. Sewers shall be built in the east and west alleys in city blocks number thirty-seven hundred and thirty-eight, thirty-seven hundred and thirty-seven and thirty-seven hundred and thirty-nine; in the north and south alleys in city block number thirty-seven hundred and thirty-nine and in Krum avenue, as follows:
70 First, sewers eighteen inches in diameter, made of vitrified clay pipe, from the main sewer in Vandeventer avenue eastwardly three hundred and fifty feet; in the east and west alley in city block numbered thirty-seven hundred and thirty-eight, and two

hundred and ninety feet in the east and west alley in city block number thirty-seven hundred and thirty-nine. Second, sewers fifteen inches in diameter, made of vitrified clay pipe, eastwardly from the eighteen-inch pipe sewers above described three hundred and fifty feet in city blocks number thirty-seven hundred and thirty-eight and thirty-seven hundred and thirty-seven, and in city block number thirty-seven hundred and thirty-nine, to the north and south alley in said block. Third, sewers twelve inches in diameter, made of vitrified clay pipe, from the fifteen-inch pipe sewer in city block number thirty-seven hundred and thirty-seven, above described, eastwardly to Spring avenue; in the north and south and east and west alleys in city block number thirty-seven hundred and thirty-nine, from the fifteen-inch pipe sewer above described southwardly to Cook avenue and eastwardly to Prairie avenue and in Krum avenue from Finney avenue to Cook avenue.

SEC. 14. Sewers shall be built in the east and west alley in city block number thirty-seven hundred and thirty-five, and in alleys in city block number thirty-seven hundred and thirty-four as already dedicated and as established by ordinance number thirteen thousand and twenty-two; in Vandeventer avenue and in Easton avenue, as follows: First, sewers eighteen inches in diameter, made of vitrified clay pipe, from the main sewer in Vandeventer avenue eastwardly two hundred and ninety feet; in the east and west alley in city block number thirty-seven hundred and thirty-five, and in city block number thirty-seven hundred and thirty-four, eastwardly and southwardly to the intersection of the western north and south alley with the southern east and west alley in said block. Second, sewers fifteen inches in diameter, made of vitrified clay pipe, from the eighteen-inch pipe sewers above described eastwardly two hundred and fifty feet in said block number thirty-seven hundred and thirty-five, in city block number thirty-seven hundred and thirty-four eastwardly
71 to the eastern north and south alley in said block, and in Vandeventer avenue from the end of the main sewer northwardly to Easton avenue. Third, sewers twelve inches in diameter, made of vitrified clay pipe, eastwardly in city block number thirty-seven hundred and thirty-five, from the fifteen-inch pipe sewer above described to Prairie avenue; in city block number thirty-seven hundred and thirty-four from the fifteen-inch pipe sewer above described southwardly to Evans avenue, and in Easton avenue from the fifteen-inch pipe sewer in Vandeventer avenue, above described, eastwardly about four hundred and fifty-five feet.

SEC. 15. Sewers shall be built in proposed Westminster place, Warne avenue and Sarah street and in the alley in city block number thirty-nine hundred and twenty-four, as established by ordinance number thirteen thousand one hundred and eighty-five and in the alley in city block number forty-five hundred and eighty-four, as now dedicated and proposed along the line between United States surveys number sixteen hundred and sixty-three and sixteen hundred and sixty-four, as follows: First, a sewer two feet and six inches in mean diameter, made of brick laid in hydraulic cement mortar, from the main sewer in Vandeventer avenue westwardly in

the east and west alley in city block number thirty-nine hundred and twenty-four, a distance of five hundred and twenty feet. Second, sewers eighteen inches in diameter, made of vitrified clay pipe, from the brick sewer just described westwardly in city block number thirty-nine hundred and twenty-four, a distance of four hundred and twenty feet, and on Sarah street from the southern end of the main sewer described in section one of this ordinance, southwardly to the line between United States surveys number sixteen hundred and sixty-three and sixteen hundred and sixty-four, and in the east and west and north and south alleys in city block number forty-five hundred and eighty-four from the main sewer in Vandeventer avenue to a point about two hundred and ninety feet west of Vandeventer avenue. Third, sewers fifteen inches in diameter made of vitrified clay pipe, from the eighteen-inch pipe sewers in city blocks number thirty-nine hun-
72 dred and twenty-four and forty-five hundred and eighty-four, above described, westwardly two hundred and fifty feet in said city block number forty-five hundred and eighty-four, and two hundred and eighty feet in said city block number thirty-nine hundred and twenty-four, and from the main sewer in Vandeventer avenue westwardly in proposed Westminster place about three hundred and seventy-five feet. Fourth, sewers twelve inches in diameter, made of vitrified clay pipe, from the fifteen-inch pipe sewer in city block number thirty-nine hundred and twenty-four, westwardly to Sarah street and southwardly in Sarah street to proposed Westminster place. From the fifteen-inch pipe sewer in city block number forty-five hundred and eighty-four westwardly four hundred feet; also from the eighteen-inch pipe sewer in Sarah street at the line between United States surveys number sixteen hundred and sixty-three and sixteen hundred and sixty-four, eastwardly along the line about four hundred and fifty feet, and in Warne avenue from the eighteen-inch pipe sewer above described, southwardly to proposed Westminster place.

SEC. 16. Sewers shall be built in the east and west alleys in city blocks number thirty-seven hundred and fifty-two, thirty-seven hundred and fifty-three and thirty-seven hundred and fifty-four and in the north and south alley, in city block number thirty-seven hundred and fifty-four, as follows: First, sewers fifteen inches in diameter, made of vitrified clay pipe, from the six-feet-six-inch brick sewer in Morgan street northwardly in the north and south alley in city block number 3754 to the east and west alley in said city block number 3754 and westwardly in said east and west alley to a point 360 feet west of Vandeventer avenue; in the east and west alley in city block number 3752 from the main sewer in Vandeventer avenue westwardly 360 feet and from the main sewer in Sarah street eastwardly two hundred and eighty feet; in the east and west alley in city block number 3753, from the main sewer in Vandeventer avenue westwardly 400 feet and from the main sewer in Sarah street eastwardly 290 feet and in the alley in city block number 3754
73 north of the St. Louis Cable and Western railway from the main sewer in Sarah street eastwardly 280 feet. Second,

sewers twelve inches in diameter, made of vitrified clay pipe, from the fifteen-inch pipe sewers in city block number 3752 and 3753 above described westwardly 500 feet and eastwardly 300 feet; from the fifteen-inch pipe sewers in city block number 3754 above described westwardly 300 feet and eastwardly in the alley north of the Saint Louis Cable and Western railway about 500 feet.

SEC 17. Sewers shall be built in the east and west alley in city block number 4565, established by ordinance number 13188; in Fairfax avenue and in Finney avenue, as follows: First, sewers, fifteen inches in diameter, made of vitrified clay pipe, in the east and west alley in city block number 4565, established by ordinance number 13188, westwardly from the main sewer in Vandeventer avenue 235 feet and eastwardly from the main sewer in Sarah street 275 feet. Second, sewers twelve inches in diameter, made of vitrified clay pipe, in said alley in city block number 4565 from the fifteen-inch pipe sewers above described westwardly 500 feet and eastwardly 450 feet; in Fairfax avenue westwardly from the main sewer in Vandeventer avenue 700 feet, and eastwardly from the main sewer in Sarah street 750 feet, and in Finney avenue from the main sewer in Sarah street eastwardly 680 feet.

SEC. 18. Sewers shall be built in the north and south and east and west alleys in city block number 3742 as dedicated and established by ordinance 13198; in the north and south alley in city block number 3740, in the east and west alley in city block number 3741, in Finney avenue, in Cook avenue and in Page avenue, as follows: First, a sewer two feet and six inches in mean diameter, made of brick laid in hydraulic cement mortar, from the main sewer in Sarah street eastwardly in the east and west alley in city block number 3741, a distance of 220 feet. Second, sewers eighteen inches in diameter, made of vitrified clay pipe, from the brick sewer last described eastwardly 400 feet, and from the main sewer in Vandeventer avenue westwardly in Finney avenue to the north and south alley in city block number 3742 and northwardly in said north and south alley to the east and west alley in said block. Third, sewers fifteen inches in diameter made of vitrified clay pipe, from the eighteen-inch pipe sewer in city block number 3742 last described, northwardly to Cook avenue; from the main sewer in Sarah street eastwardly in the east and west alley in city block number 3742 a distance of 320 feet and from the eighteen-inch pipe sewer in city block number 3741 eastwardly 320 feet. Fourth, sewers twelve inches in diameter, made of vitrified clay pipe, from the eighteen-inch pipe sewer in city block number 3742, above described, westwardly 500 feet; from the fifteen-inch pipe sewer in the east and west alley of said city block eastwardly 500 feet; from the fifteen-inch pipe sewer at Cook avenue above described northwardly in the north and south alley in city block number 3740 to Page avenue and westwardly in Page avenue to Jones avenue; also westwardly in Cook avenue from said fifteen-inch pipe sewer 400 feet in Finney avenue from the eighteen-inch pipe sewer above described westwardly to a suitable connection with the twelve-inch pipe sewer in

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said avenue laid by C. M. Newcomb and others under permit number 16577; and in Page avenue from the main sewer in Sarah street eastwardly 400 feet.

SEC. 19. Sewers shall be built in the east and west alley in city block number 3733 and in the alleys in city block number 3732 as said alleys have been dedicated or established by ordinance number 13024, and in Evans avenue, as follows: First, sewers two feet and six inches in mean diameter, made of brick laid in hydraulic cement mortar, from the main sewer in Sarah street eastwardly in the east and west alley in city block number 3733, a distance of 200 feet and in the east and west and western north and south alleys in city block number 3732 from the main sewer in Sarah street to the southern east and west alley in said block. Second, sewers eighteen inches in diameter made of vitrified clay pipe, from the brick sewer in city block number 3733; above described, eastwardly 300 feet and from the brick sewer in city block number 3732 eastwardly 220 feet. Third, sewers fifteen inches in diameter, made of
75 vitrified clay pipe, from the eighteen-inch pipe sewer in city block number 3733, above described, eastwardly 225 feet and westwardly in said block from the main sewer in Vandeventer avenue 205 feet; from the eighteen-inch pipe sewer in city block number 3732 above described, eastwardly 200 feet and westwardly in said block number 3732, from the main sewer in Vandeventer avenue to a point in the southern east and west alley in said block, 240 feet west of Vandeventer avenue. Fourth, sewers twelve inches in diameter, made of vitrified clay pipe, from the fifteen-inch pipe sewers in city block number 3733, above described, eastwardly and westwardly 275 feet; from the fifteen-inch pipe sewer in city block number 3732, above described, eastwardly 300 feet and westwardly 300 feet, and in Evans avenue from the main sewer in Sarah street eastwardly 400 feet.

SEC. 20. Sewers shall be built in the east and west alleys in city blocks number- 3658, 3659, 3660 and 3681, as said alleys have been dedicated or established by ordinance- numbered 13190, 13191 and 13192; in Belleglade avenue and in Goode avenue, as follows: First, a sewer two feet and six inches in mean diameter, made of brick, laid in hydraulic cement mortar, from the main sewer in Sarah street, westwardly in the said east and west alley to the center of Belleglade avenue. Second, a sewer eighteen inches in diameter, made of vitrified clay pipe, from the brick sewer last described, westwardly in said alley 325 feet. Third, a sewer fifteen inches in diameter, made of vitrified clay pipe, from the eighteen-inch pipe sewer last described, westwardly 230 feet. Fourth, sewers twelve inches in diameter, made of vitrified clay pipe, from the main sewer in Sarah street eastwardly in alley in city block number 3658, about 455 feet; in the alley in city block number 3681, from the fifteen-inch pipe sewer above described, westwardly to Goode avenue and southwardly in Goode avenue to Easton avenue, and in Belleglade avenue southwardly from the brick sewer above described to Easton avenue.

SEC. 21. Sewers shall be built in all the alleys in city blocks num-

ber- 3662, 3663, 3661 and 3664, as established by ordinanc
76 13194, 13193, 13195 and 13196, respectively; in Garfield—
established by ordinance number 12848, and in St. Ferd
nand avenue as established by ordinance number 12849, as follow
First, sewers two feet and six inches in mean diameter, made
brick, laid in hydraulic cement mortar, from the main sewer
Lucky street northwardly in alley in city block number 3661,
distance of 450 feet, and in the alley in city block number 3662,
distance of one hundred and eighty-five feet. Second, sewers eigh
teen inches in diameter, made of vitrified clay pipe, from the bric
sewer above described northwardly in city blocks number- 3661 an
3664, a distance of 310 feet, and in city block number 3662
Garfield avenue. Third sewers fifteen inches in diameter, made
vitrified clay pipe, from the eighteen-inch pipe sewers just abov
described, northwardly in city block number 3664, a distance
300 feet, in city block number 3663, a distance of 315 feet. Fourth
sewers twelve inches in diameter, made of vitrified clay pipe, fro
the fifteen-inch pipe sewers just described, northwardly to St. Ferdi
nand avenue and eastwardly and westwardly in St. Ferdinan
avenue to Belleglade avenue and in Garfield avenue eastwardl
from the eighteen-inch pipe sewer above described to Belleglad
avenue and Sarah street.

SEC. 22. Sewers shall be built in the alleys in city blocks num
bered 3677, 3678, 3679, 3680, 3684, 3685, and 3686; in Whittie
street, in Lucky street, in North Market street and in Garfield
avenue, as follows: First, sewers two feet and six inches in mean
diameter, made of brick laid in hydraulic cement mortar, from the
main sewer in Whittier street, northwardly in Whittier street to
the east and west alley in city block number 3678 and from the
main sewer in Whittier street westwardly in the east and west alley
in city block number 3680 to the north and south alley in said
block and northwardly in said north and south alley and in the north
and south alley in city block number 3679 to Garfield avenue.
Second, sewers eighteen inches in diameter, made of vitrified clay
pipe from the brick sewer at the intersection of the east
and west with the north and south alleys in city block
number 3680, southwardly on the said north and south
alley to Lucky street, and westwardly in Lucky street
77 to the centre of Goode avenue; in Garfield avenue, from
the brick sewer above described, westwardly to the north
and south alley in city block number 3685, and northwardly in
said north and south alley to the east and west alley in said
block; and in Whittier street, from the end of the brick sewer above
described, northwardly to the east and west alley in city block
number 3677. Third, sewers fifteen inches in diameter, made of
vitrified clay pipe, in each of the east and west alleys in city blocks
number- 3677 and 3678, from the sewer in Whittier street above de-
scribed, westwardly 225 feet; and in the north and south alleys in
city blocks number- 3685 and 3686, from the eighteen-inch pipe
sewer above described, northwardly to the east and west alley in
city block number 3686. Fourth, sewers twelve inches in diameter,

made of virified clay pipe, from the eighteen-inch pipe sewer above described, northwardly in Whittier street to St. Ferdinand avenue; in the east and west alleys in city blocks number- 3677 and 3678, from the fifteen-inch pipe sewer above described westwardly to the north and south alleys in said blocks and in said north and south alleys from North Market street to St. Ferdinand avenue and from Garfield avenue to North Market street respectively; from the brick sewer in Whittier street above described westwardly in the east and west alley in city block number 3679 about 350 feet; in the north and south alley in city block number 3684 from the eighteen-inch pipe sewer in Garfield avenue southwardly to the boundary line of the district, from the eighteen-inch pipe sewer above described westwardly in the east and west alley in city block number 3685, a distance of 375 feet; from the fifteen-inch pipe sewer above described, westwardly in the east and west alley in city block number 3686, a distance of 370 feet, and northwardly in the north and south alley in said block to St. Ferdinand avenue in North Market street from the fifteen-inch pipe sewer above described, eastwardly to Goode avenue and in Garfield avenue from the eighteen-inch pipe sewer above described westwardly 380 feet.

SEC. 23. Sewers shall be built in east and west alleys in
78 city blocks number- 3731 and 3728 as said alleys are now laid out or established by ordinance number 13025, and in the east and west alleys in city blocks number- 3730 and 3729 and in Whittier street, as follows: First, sewers two feet and six inches in mean diameter, made of brick, laid in hydraulic cement mortar, from the main sewer in Sarah street westwardly in city blocks number- 3731 and 3728, to a point 810 feet west of Sarah street; and in the east and west alley in city block number 3730, from the main sewer in Sarah street westwardly to the centre of Whittier street. Second, sewers eighteen inches in diameter, made of vitrified clay pipe, from the brick sewers just described westwardly in city block number 3728, a distance of three hundred feet, and in city block number 3729, a distance of 590 feet. Third, sewers fifteen inches in diameter, made of vitrified clay pipe, from the eighteen-inch pipe sewer above described, westwardly in city block number 3728, a distance of 300 feet; and in city block number 3729, a distance of 280 feet, and in Whittier street from the brick sewer above described southwardly to Page avenue. Fourth, sewers twelve inches in diameter made of vitrified clay pipe, from the fifteen-inch pipe sewers in city block- number- 3728 and 2729 westwardly to Pendleton avenue, and in Whittier street from the brick sewer last above described northwardly to Evans avenue.

SEC. 24. Sewers shall be built in the east and west alleys in city blocks number- 3744, 3745, 3743 and 3746 and in Whittier street as follows: First, sewers two feet and six inches in mean diameter, made of brick laid in hydraulic cement mortar, from the main sewer in Sarah street westwardly in city blocks numbers 3744 and 3745 to a point 886 feet west of Sarah street and in city block number 3743 a distance of 270 feet. Second, sewers eighteen inches in diameter, made of vitrified clay pipe, from the brick sewers above described

westwardly in city block number 3745 a distance of 300 feet, and in city block number 3743 to the centre of Whittier street. Third, sewer fifteen inches in diameter, made of vitrified clay pipe, from the eighteen-inch pipe sewers above described westwardly in
79 city block number 3745 a distance of 225 feet and in city block number 3746 a distance of 290 feet, and from the eighteen-inch pipe sewer last above described northwardly in Whittier street to Cook avenue. Fourth, sewers twelve inches in diameter, made of vitrified clay pipe, from the fifteen-inch pipe sewers above described westwardly in city block number 3745 to Pendleton avenue and in city block number 3746 westwardly about 345 feet.

SEC. 25. Sewers shall be laid in the east and west alley established in city block number 4566, by ordinance number 13189; in both of the east and west alleys in city block number 3755; in Finney avenue and in Fairfax avenue, as follows: First, a sewer eighteen inches in diameter, made of vitrified clay pipe, from the main sewer in Sarah street westwardly in the alley in city block number 4566 a distance of 360 feet. Second, sewers fifteen inches in diameter, made of vitrified clay pipe, from the eighteen-inch pipe sewer above described, westwardly in city block number 4566, a distance of 360 feet; in both the east and west alleys in city block number 3755, from the main sewer in Sarah street, westwardly 305 feet; in Fairfax avenue from the main sewer in Sarah street westwardly 510 feet, and in Finney avenue from the main sewer in Sarah street westwardly 510 feet. Third, sewers twelve inches in diameter, made of vitrified clay pipe, from the fifteen-inch pipe sewers above described westwardly in the east and west alleys in city block number 4566, and in Fairfax avenue and in Finney avenue to Whittier street, as said Whittier street is established by ordinance number 13020; and in both of the east and west alleys in city block number 3755 westwardly from the fifteen-inch pipe sewers above described 300 feet.

SEC. 26. As soon as said district sewers with their inlets, manholes and other appurtenances are fully completed, the board of public improvements shall cause to be computed the whole cost thereof and shall assess it as a special tax against all the lots of ground in said district respectively, without regard to improvements and in proportion as their respective areas bear to the area of the whole district, exclusive of public highways; and the board shall cause to
80 be made out a certified bill of such assessment against each lot in the district in the name of the owner thereof. And said special tax bills shall be made out by the president of said board and by him registered in his office in full and certified and delivered to the comptroller, and his receipt taken therefor and by him registered and countersigned and delivered to the party in whose favor they are issued for collection and his receipt taken in full of all claims against the city on account of said work.

Approved March 16, 1886.

(14630.)

An ordinance to amend ordinance number 13596, entitled "An ordinance to provide for the construction of sewers in Vandeventer Avenue sewer district number one," approved March 16, 1886.

Be it ordained by the municipal assembly of the city of St. Louis, as follows:

SECTION 1. Ordinance number 13596 entitled: "An ordinance to provide for the construction of sewers in Vandeventer Avenue sewer district number one," is hereby amended by striking out sections 4, 5, 6, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 25, and inserting in lieu thereof sections having the same numbers, as follows:

SEC. 4. Sewers shall be built in the east and west alleys in city blocks number- 3928 and 1959, and in Cabanne street, as follows:

First. A sewer two feet and six inches in mean diameter, made of brick laid in hydraulic cement mortar, from the main sewer in Vandeventer avenue eastwardly about 417 feet.

Second. A sewer eighteen inches in diameter, made of vitrified clay pipe, from the brick sewer last described, eastwardly for a distance of about 500 feet.

Third. A sewer fifteen inches in diameter, made of vitrified clay pipe, from the eighteen-inch pipe sewer last described, eastwardly to the center of Cabanne street.

Fourth. Sewers twelve inches in diameter, made of vitrified
81 clay pipe, from the fifteen-inch pipe sewer last described, eastwardly about 300 feet; also in Cabanne street from Pine street to Laclede avenue.

SEC. 5. Sewers shall be built in the east and west alleys, in city blocks 3927 and 1960, as follows:

First. A sewer two feet and six inches in mean diameter, made of brick laid in hydraulic cement mortar, from the main sewer in Vandeventer avenue eastwardly about 720 feet.

Second. A sewer eighteen inches in diameter, made of vitrified clay pipe, from the brick sewer last described, eastwardly about 500 feet.

Third. A sewer fifteen inches in diameter, made of vitrified clay pipe, from the eighteen-inch pipe sewer last described, eastwardly about 400 feet.

Fourth. Sewers twelve inches in diameter, made of vitrified clay pipe, from the fifteen-inch pipe sewer last described, eastwardly to the north and south alley in city block number 1960, and southwardly in north and south alley to Pine street.

SEC. 7. Sewers shall be built on the east and west alleys in city blocks number- 3926 and 1961, as follows:

First. A sewer two feet and six inches in mean diameter, made of brick laid in hydraulic cement mortar, from the main sewer on Vandeventer avenue eastwardly about 580 feet.

Second. A sewer eighteen inches in diameter, made of vitrified clay pipe; from the brick sewer last described, eastwardly about 600 feet.

Third. A sewer fifteen inches in diameter, made of vitrified clay

pipe, from the eighteen-inch pipe sewer last described, eastwardly about 310 feet.

Fourth. A sewer twelve inches in diameter, made of vitrified clay pipe, from the fifteen-inch pipe sewer last described, eastwardly about 460 feet.

SEC. 8. Sewers shall be built in city blocks numbered 4585 and 2287, in Washington avenue, Olive street and Cabanne street, as follows: First. Sewers eighteen inches in diameter, made of vitrified clay pipe, from the main sewer in Vandeventer avenue, eastwardly in Washington avenue about 875 feet; and from the main
82 sewer in Vandeventer avenue eastwardly along the right of way of the St. Louis Cable and Western Railway Company and near the north line thereof (said St. Louis Cable and Western Railway Company having conveyed to the city of St. Louis the right to construct and maintain a district sewer in their right of way), to Cabanne street. Second. Sewers fifteen inches in diameter, made of vitrified clay pipe, from the eighteen-inch pipe sewer at Cabanne street above described eastwardly along the aforesaid right of way, about 530 feet, and in Cabanne street from the eighteen-inch pipe sewer above described southwardly to Olive street, and thence eastwardly in Olive street to Cabanne street, running south, and in Olive street from the main sewer in Vandeventer avenue eastwardly about 350 feet. Third. Sewers twelve inches in diameter, made of vitrified clay pipe from the eighteen-inch pipe sewer in Washington avenue eastwardly about 80 feet; from the fifteen-inch pipe sewer, first above described, eastwardly along a right of way granted by sundry persons to the city of St. Louis, about 280 feet, and in Cabanne street, from the eighteen-inch pipe sewer, above described, northwardly to Washington avenue.

SEC. 9. Sewers shall be built in the east and west alleys in city blocks number- 3751 and 2288 south, and in Delmar avenue, as follows:

First. A sewer eighteen inches in diameter, made of vitrified clay pipe, from the main sewer in Vandeventer avenue, eastwardly in the east and west alley, in city block number 3751, about 670 feet.

Second. A sewer fifteen inches in diameter made of vitrified clay pipe, from the eighteen-inch pipe sewer last described, eastwardly about 600 feet.

Third. Sewers twelve inches in diameter, made of vitrified clay pipe, from the fifteen-inch pipe sewer, last described, eastwardly about 550 feet, and from the main sewer in Vandeventer avenue eastwardly in Delmar avenue, about 350 feet.

SEC. 11. Sewers shall be built in Morgan street, Bell avenue and Cabanne street, as follows: First: Sewers two feet and six inches in mean diameter, made of brick laid in hydraulic cement
83 mortar, from the main sewer in Vandeventer eastwardly about 506 feet in Morgan street and about 490 feet in Bell avenue. Second. Sewers eighteen inches in diameter, made of vitrified clay pipe, from the brick sewers above described, eastwardly to Cabanne street. Third. Sewers fifteen inches in diameter, made of vitrified clay pipe, from the eighteen-inch pipe sewers last de-

scribed, eastwardly in Morgan street about 250 feet, and in Bell avenue about 310 feet; and in Cabanne street, from the eighteen-inch pipe sewer above described in Morgan street northwardly about 270 feet. Fourth. Sewers twelve inches in diameter, made of vitrified clay pipe, eastwardly from the fifteen-inch pipe sewer above described in Morgan street, about 700 feet, and from the fifteen-inch pipe sewer above described in Bell avenue eastwardly about 640 feet.

SEC. 12. Sewers shall be built in the east and west alleys in city blocks number 3747 and 3749, in St. Alphonsus street and in Windsor place, as follows: First. A sewer two feet and six inches in mean diameter, made of brick, laid in hydraulic cement mortar, from the main sewer in Vandeventer avenue eastwardly in the alley in city block number 3747 about 730 feet. Second. A sewer eighteen inches in diameter, made of vitrified clay pipe, eastwardly from the brick sewer last described, about 650 feet. Third. Sewers fifteen inches in diameter, made of vitrified clay pipe, eastwardly from the eighteen-inch pipe sewer last described, to St. Alphonsus street; and in Windsor place, from the main sewer in Vandeventer avenue, eastwardly about 350 feet. Fourth. A sewer twelve inches in diameter, made of vitrified clay pipe, in St. Alphonsus street, from Bell avenue to Finney avenue.

SEC. 13. Sewers shall be built in the east and west alleys in city blocks 3738, 3737, and 3739, in the north and south alley in city block number 3739, and in Krum avenue, as follows: First. Sewers eighteen inches in diameter, made of vitrified clay pipe, from the main sewer in Vandeventer avenue eastwardly about 350 feet, in the east and west alley in city block number 3738, and about 290 feet in the east and west alley in city block number 3738, and about 290 feet in the
84 east and west alleys in city block number 3739. Second. Sewers fifteen inches in diameter, made of vitrified clay pipe, eastwardly from the eighteen-inch pipe sewers above described, about 350 feet, in city blocks 3738, 3737, and in city block number 3739, to the north and south alley in said block. Third, sewers twelve inches in diameter, made of vitrified clay pipe, from the fifteen-inch pipe sewer above described, in city block number 3737, eastwardly to Spring avenue, in the north and south and east and west alleys, in city block number 3739, from the fifteen-inch pipe sewer above described southwardly to Cook avenue and eastwardly to Prairie avenue, and in Krum avenue from Finney avenue to Cook avenue.

SEC. 14. Sewers shall be built in the east and west alley in city block number 3735, and in the alleys in city block number 3734, in Vandeventer avenue and in Easton avenue, as follows: First, sewers eighteen inches in diameter, made of vitrified clay pipe, from the main sewer in Vandeventer avenue eastwardly about 290 feet in the east and west ally in city block number 3735; and in city block number 3734 eastwardly and southwardly to the intersection of the western north and south alley with the southern east and west alley in said block. Second, sewers fifteen inches in diameter, made of vitrified clay pipe, from the eighteen-inch pipe sewers above

described, eastwardly about 260 feet in city block number 3735; in city block number 3734 eastwardly to the eastern north and south alley in said block, and in Vandeventer avenue, from the end of the main brick sewer northwardly to Easton avenue. Third, sewers twelve inches in diameter made of vitrified clay pipe, eastwardly in city block number 3735, from the fifteen-inch pipe sewer above described eastwardly to Prairie avenue; in city block number 3734 from the fifteen-inch pipe sewer above described southwardly to Evans avenue; and in Easton avenue from the fifteen-inch pipe sewer in Vandeventer avenue above described eastwardly about 455 feet.

SEC. 15. Sewers shall be built in Sarah street, and in the alleys in city block number 4584, as follows: First, sewers eighteen
85 inches in diameter made of vitrified clay pipe, in Sarah street from the southern end of the main sewer described in section two of this ordinance, southwardly to the alley in city block number 4584; and in the east and west and north and south alleys in said city block number 4584, from the main sewer in Vandeventer avenue westwardly and southwardly to a point about 290 feet west of Vandeventer avenue. Second, a sewer fifteen inches in diameter, made of vitrified clay pipe, from the eighteen-inch pipe sewer in city block number 4584 above described westwardly about 250 feet. Third, sewers twelve inches in diameter, made of vitrified clay pipe, from the fifteen-inch pipe sewer last described westwardly about 400 feet; also from the eighteen-inch pipe sewer in Sarah street above described eastwardly in the east and west alley in city block number 4584, about 450 feet, and in Sarah street from the eighteen-inch pipe sewer above described southwardly to Olive street.

SEC. 16. Sewers shall be built in the east and west alleys in city blocks number 3752, 3753 and 3754, and in the north and south alley in city block number 3754, as follows: First, sewers fifteen inches in diameter, made of vitrified clay pipe, from the six-feet-six-inch brick sewer in Morgan street northwardly in the north and south alley in city block number 3754 to the east and west alley in said city block number 3754, and westwardly in said east and west alley to a point about 400 feet west of Vandeventer avenue in the east and west alley in city block number 3752, from the main sewer in Vandeventer avenue westwardly about 360 feet; and from the main sewer in Sarah street eastwardly about 280 feet; in the east and west alley in city block number 3753, from the main sewer in Vandeventer avenue westwardly about 394 feet; and from the main sewer in Sarah street eastwardly about 290 feet and in the east and west alley in city block number 3754, north of the St. Louis Cable and Western railway from the main sewer in Sarah street eastwardly about 280 feet. Second, sewers twelve inches in diameter made of vitrified clay pipe, from the fifteen-inch pipe sewers in city block number 3752 westwardly about 530 feet, and eastwardly
86 about 300 feet, from the fifteen-inch pipe sewers in city block number 3753 westwardly about 500 feet and eastwardly about 300 feet; and eastwardly in the alley in city block number 3754, north of the St. Louis Cable and Western railway, about 500 feet

from the fifteen-inch pipe sewer above described; and in the east and west alley in the eastern part of said block, from the fifteen-inch pipe sewer first above described westwardly about 265 feet.

SEC. 17. Sewers shall be built in the east and west alley in city block number 4565, in Fairfax avenue and in Finney avenue, as follows: First, sewers fifteen inches in diameter made of vitrified clay pipe, in the east and west alley in city block number 4565, westwardly from the main sewer in Vandeventer avenue about 235 feet; and eastwardly from the main sewer in Sarah street about 275 feet. Second, sewers, twelve inches in diameter, made of vitrified clay pipe, in said alley, in city block number 4565, from the fifteen-inch pipe sewers above described, westwardly about 525 feet, and eastwardly about 450 feet, in Fairfax avenue westwardly from the main sewer in Vandeventer avenue about 700 feet, and eastwardly from the main sewer in Sarah street about 750 feet; and in Finney avenue from the main sewer in Sarah street eastwardly about 680 feet.

SEC. 18. Sewers shall be built in the north and south and east and west alleys in city block number 3742; in the north and south alley in city block number 3740; in the east and west alley in city block number 3741; in Finney avenue, in Cook avenue and in Page avenue as follows: First, a sewer two feet and six inches in mean diameter, made of brick laid in hydraulic cement mortar, from the main sewer in Sarah street eastwardly in the east and west alley in city block number 3741 about 220 feet. Second, sewers eighteen inches in diameter, made of vitrified clay pipe, from the brick sewer last described eastwardly about 400 feet and from the main sewer in Vandeventer avenue westwardly in Finney avenue to the north and south alley in city block number 3742, and northwardly in said alley to the east and west alleys in said block. Third, sewers fifteen inches in diameter, made of vitrified clay pipe, from the
87 eighteen-inch pipe sewer in city block number 3742 last described northwardly to Cook avenue, from the main sewer in Sarah street eastwardly in the east and west alley in city block number 3742 about 325 feet; and from the eighteen-inch pipe sewer in city block number 3741, eastwardly about 320 feet; fourth, sewers twelve inches in diameter, made of vitrified clay pipe, from the eighteen-inch pipe sewer in city block number 3742 above described westwardly about 520 feet, from the fifteen-inch pipe sewer in the east and west alley in said block, eastwardly about 485 feet; from the fifteen-inch pipe sewer at Cook avenue above described, northwardly in the north and south alley in city block number 3740 to Page avenue, and westwardly in Page avenue to Jones avenue; also westwardly in Cook avenue from said fifteen-inch pipe sewer about 400 feet, in Finney avenue from the eighteen-inch sewer above described, westwardly to a suitable connection with the twelve-inch pipe sewer in said avenue laid by C. M. Newcomb and others, under permit number 16577, and in Page avenue from the main sewer in Sarah street eastwardly about 400 feet.

SEC. 19. Sewers shall be built in the east and west alley in city block number 3733 and in the alleys in city block number 3732, and in Evans avenue, as follows: First, sewers two feet and six

inches in mean diameter, made of brick laid in hydraulic cement mortar, from the main sewer in Sarah street eastwardly in the east and west alley in city block number 3733, about 200 feet; and in the east and west and western north and south alley in city block number 3732 from the main sewer in Sarah street to the southern east and west alley in said block. Second, sewers eighteen inches in diameter, made of vitrified clay pipe, from the brick sewer in city block number 3733, above described, eastwardly about 300 feet, and from the brick sewer in city block number 3732, eastwardly about 220 feet. Third, sewers fifteen inches in diameter, made of vitrified clay pipe, from the eighteen-inch pipe sewer in city block number 3733, above described, eastwardly about 225 feet, and westwardly in said block from the main sewer in Vandeventer
88 avenue about 240 feet; from the eighteen-inch pipe sewer in city block number 3732, above described, eastwardly about 200 feet, and westwardly in said city block number 3732, from the main sewer in Vandeventer avenue to the southern east and west alley in said block. Fourth, sewers twelve inches in diameter, made of vitrified clay pipe, from the fifteen-inch pipe sewers in city block number 3733, above described, eastwardly about 275 feet and westwardly about 245 feet; from the fifteen-inch pipe sewers in city block number 3732, above described, eastwardly about 300 feet and westwardly about 400 feet, and in Evans avenue, from the main sewer in Sarah street eastwardly about 400 feet.

WILLIAM WISE, sworn on behalf of the defendants, testified as follows:

Direct examination.

By Mr. GROVER:

Q. Your name, sir?

A. William Wise.

Q. Your occupation?

A. Assistant sewer commissioner.

Q. For how long a period?

A. Off and on for the last time about sixteen years.

Q. Did you hold your office during the time at which the Vandeventer sewer was constructed with its laterals and inlets in Vandeventer Avenue sewer district No. 1, referred to in plaintiff's petition?

A. Yes, sir.

Q. I will ask you if you had occasion to know anything about the construction of that sewer?

A. Yes, sir, of course; being in that position, I looked after it.

Q. The construction of it was under your supervision?

A. Yes, sir; under the sewer commissioner.

Q. Will you tell the court what is meant by "inlets" as referred to in that record which Mr. Foster read here—283 inlets?

A. There were inlets made at the intersection of the streets and other places where the water is directed into the sewer;
89 the water running on the street and street gutters are caught by the sewer inlets and carried to the sewer.

Q. Now, would you call it an inlet where one of these alley sewers came down from an alley and connected with the main sewer?

A. We would not call it an inlet: we would call it a branch sewer—branch or lateral sewer.

Q. Now, Mr. Wise, can you tell from memory how large was the first one of these lateral sewers coming into that Vandeventer Avenue sewer from the east?

Counsel for plaintiff objected on grounds already stated.

The court overruled the objection.

A. You mean the first lateral sewer?

Q. Brick sewer?

A. The first lateral sewer north of the beginning of the sewer?

Q. Yes.

A. That was on the first alley, of course, that we encountered—I think it was a two by three brick sewer.

Q. What was the diameter of that sewer?

A. Two by three.

Q. Now, what was the average length, running east, of those lateral brick sewers called for by the ordinances and contract in this case?

Counsel for plaintiff objected on the ground that the ordinances are the best evidence.

A. I have no memorandum of the length of each of these sewers, but the sewers running eastwardly from Vandeventer run to about the boundary line of the district and that district is defined by the ordinances.

Q. Do you know what the boundary line was?

A. Yes, sir; I know approximately. I don't know the exact distance east of Vandeventer; perhaps it was at the beginning, near Duncan avenue; it was not very far—only a couple of hundred feet—two or three hundred feet or a block or two.

90 Q. Was it Pine or Olive street?

A. Pine street runs east to the top of the hill near Grand avenue, about three hundred feet from Grand.

Q. What would be approximately the distance from the beginning of the laterals near Grand avenue to the western terminus of them at Vandeventer?

A. At Pine street?

Q. Pine and Olive and Washington and all along.

A. It would be upwards of 2,000 feet, something like that.

Q. Fully that?

A. Yes, sir.

Q. Now, Mr. Wise, what approximately would be the length of the lateral brick sewers which come into the Vandeventer Avenue sewer from the west?

A. At what place?

Q. Say at Pine, Olive, Washington—along there?

A. At Pine there was none on the west.

Q. Was there at Chestnut?

A. There is no Chestnut there.

Q. How about Olive?

A. At Olive there was none.

Q. Where was the first brick sewer coming in from the west?

A. I think it was on the alley north of Olive street.

Q. What was the length of that?

A. As near as I can tell about 1,500 feet.

Q. And was it run with different dimensions, you have given some of those—of the extreme length and——

A. (Interrupting.) Well, the last I mentioned was not all brick sewer; I believe it commenced with a brick sewer, but tapered off to a pipe as we reached the summit.

Q. How far approximately did it run as a brick sewer?

A. Perhaps one-third of the way, and the balance was of pipe of different dimensions.

91 Q. Now north on Vandeventer up to Morgan, what was the length of those lateral sewers running in from the east—what was the average length?

A. They all run up to a point near Grand avenue; they were not all alike; the line along the eastern boundary was not parallel to Grand avenue altogether; some places it was at Grand avenue, and other places as much as three hundred feet west, and the district sewers from Vande-ter up, ended at that boundary line.

Q. Where it ran from Grand avenue down there what would you say was the distance down to Vandeventer?

A. As near as I can guess about half a mile.

Q. Where it went three hundred feet west it would be three hundred feet less than half a mile?

A. I just guess; I don't know.

Q. Well, it is over 2,000 feet from Grand avenue to Vandeventer avenue?

A. I should say so; the first block is a thousand feet, and the next is about the same.

Q. Now these lateral sewers, as you have described them, were made to connect with the Vandeventer Avenue sewer and carry off the sewerage of those different territories and carry it into the Vandeventer Avenue sewer—the sewerage from these laterals?

A. They centered into the Vandeventer Avenue sewer.

Q. And also likewise from the west?

A. Yes, sir.

Q. Then the run was straight down to the Mill Creek sewer?

A. Yes, sir.

Q. Through this Vandeventer Avenue sewer?

A. Yes, sir.

Q. Now, what was the Mill Creek sewer—a public or district sewer?

Counsel for plaintiff objected on the ground that it does not appear that witness knows.

Q. Do you know whether the Mill Creek sewer is a public or district sewer?

A. I do.

Counsel for plaintiff withdrew the objection.

Q. What is it?
A. A public sewer.

92 The COURT: What made it so?

(By Mr. GROVER:)

Q. What made it so?

Counsel for plaintiff objected.

Mr. GROVER: I can ask what the size of the Mill Creek sewer was.
The COURT: I don't care for that.

(By Mr. GROVER:)

Q. Now, Mr. Wise, what is the size of the Mill Creek sewer at the point of its connection with the Vandeventer Avenue sewer?

Counsel for plaintiff objected.
The court overruled the objection.

A. 14 feet wide and 12 feet high.
Q. What would you say was the diameter?
A. Fourteen by twelve.
Q. I want to know which was the twelve feet and which the fourteen feet.
A. I said fourteen feet wide and twelve feet high.
Q. Now, Mr. Wise, can you state what was the object in carrying this Vandeventer Avenue sewer west on Morgan to Sarah street and then north on Sarah?

Mr. ROGERS: I object as incompetent—stating what the object of the board of public improvement was.
Counsel for defendant withdrew the question.

(By Mr. GROVER:)

Q. Mr. Wise, was there an elevation of land on Morgan street, between Vandeventer avenue and Sarah street?
A. Yes, sir.
Q. Then at Sarah street the land was lower than it was at a point between Vandeventer and Sarah street—there was a depression?
A. There was quite a hill between Sarah and Vandeventer.
Q. And there was on the other side of the hill another drainage system until you cut through with the sewer?

Counsel for plaintiff objected.

Q. How far west of Sarah street was the western line of the district at that time?

93 A. It was at Sarah street; Sarah street was the western boundary at that point, but it widened out north of that further west.

Q. I say, then, on the other side of this elevation that you had to

cut through as you carried this sewer west on Morgan street you tapped a low depression on that side which ran north?

A. Going through on Vandeventer from Morgan to Sarah we did not continue to the low ground to the west of that; the ravine or low ground was still further west; we went to Sarah street, which was on the side sloping westwardly which was a block further west — the lowest point.

Q. When you carried that sewer north on Sarah street to St. Ferdinand street didn't you come to the head of the drainage system which went down that depression just west of Sarah street—didn't you tap it?

A. Yes, sir.

Q. You tapped that at St. Ferdinand?

A. No, sir; not at St. Ferdinand; St. Ferdinand was at the summit—at the head of the watershed of that district.

Q. Where did you tap that natural drainage system north of Sarah?

A. We tapped it at Morgan and Sarah; when we crossed on Morgan we tapped it at Sarah.

Q. When you extended that sewer north on Sarah, you drew the drainage from St. Ferdinand street and that territory down through that sewer?

A. Yes, sir.

The COURT: The witness has spoken of a depression west of Sarah at Morgan which was not in the district.

Mr. GROVER: No, he said it was in the district—the west line of Sarah was—but the sewer went north on Sarah.

(By the COURT:)

Q. Was sewage taken from the west of Sarah into this sewer?

A. Let me explain. Sarah street was the west boundary at Morgan, and the depression was still farther west. That was tapped by another sewer running into the Mill Creek sewer from the
94 west, and this sewer on Sarah street did not drain that fall at all. The sewer going north on Sarah street drained quite a different section; the sewer crossing Morgan street west of Sarah was not tapped by this sewer.

(By Mr. GROVER:)

Q. Still the sewer ran north on Sarah to St. Ferdinand and drained all that territory up there. I will ask you if that was not the fact?

Mr. ROGERS: I object to that question as being indefinite; it don't state which sewer.

(By Mr. GROVER:)

Q. I say the Vandeventer Avenue sewer which ran north to St. Ferdinand, north on Sarah?

A. It did not do that.

Q. What did you put it there for?

Counsel for plaintiff objected.

Q. Well, begin at the beginning. Mr. Wise, from Morgan street on Sarah, how far north on Sarah did the Vandeventer Avenue sewer run?

A. To Lucky street.

Q. How far was that?

A. One block north of Easton avenue.

Q. What was the distance from Morgan street?

A. A little over half a mile.

Q. Now, when it got to Lucky street, where did it run to?

A. West to Whittier.

Q. How far was that along Lucky?

A. Perhaps seven or eight hundred feet.

Q. Now, what became of it when it got to Whittier?

A. Then it ran to St. Ferdinand.

Q. What was the distance there from Whittier to St. Ferdinand?

A. A quarter of a mile, perhaps, or 1,200 feet.

Q. Then it did drain a certain territory on the west of the elevation, which you have stated rose between Vandeventer and Sarah on Morgan. There was an elevation there between those two
95 streets; now, it did drain a portion of that territory on the west side of that elevation?

A. On the west side of which elevation?

Q. The elevation which you say rose on Morgan between Vandeventer and Sarah?

A. That elevation was dwindled out to nothing; but there was an elevation west of Sarah street, commencing a block or two north of Morgan street, and the sewer on Sarah street reached off to that elevation.

Q. And went west of it?

A. West of Sarah to the elevation west of Sarah. But the depression on Morgan street crossing Sarah was beyond that elevation; that was another fall.

Q. Now, was there any drainage from the west into this Vandeventer Avenue sewer after it left Morgan street and proceeded north on Sarah?

Mr. Rogers: I object to that as immaterial. It has not been shown what the boundary was, especially at the point north of Morgan street.

The Court: It is in the record somewhere—the boundaries.

Q. (Repeated.)

A. Yes, sir; there was.

Q. Was that drainage by means of lateral sewers?

A. Yes, sir.

Q. Coming in from the west?

A. From the east and the west into the Vandeventer Avenue sewer.

Q. From both sides?

A. Yes, sir.

(By the COURT:)

Q. You are talking about Sarah street now?
A. Vandeventer north of Morgan.

(By Mr. GROVER:)

Q. The drainage from the west into this Vandeventer Avenue sewer after it left Morgan and went north on Sarah?
The COURT: Which are you talking about now?
WITNESS: Why, I understood I was explaining Vandeventer before in both cases—Vandeventer; it drained into Vandeventer sewer from the east and west, and inter Sarah street from the east and west.

96 (By Mr. GROVER:)

Q. And also along the line when it went to Lucky, and from Lucky to Whittier the drainage on both sides, from the east and the west, went into this Vandeventer Avenue sewer?
A. Yes, sir; into this sewer at that place. It was not on Vandeventer avenue.
Q. I understand—the main stem of it?
A. Yes, sir.

Cross-examination by Mr. ROGERS:

Q. Mr. Wise, this Vandeventer Avenue sewer did not drain any territory west of Sarah street and south of Morgan street, did it?
A. No, sir.
Q. Now, if it drained any territory west of Sarah street, at what point was that with reference to Morgan street? Take the part that goes north on Sarah street. Now where did the first lateral come in from the west?
A. I think it was about a block north of Morgan street.
Q. Now, all these laterals which you referred to here in your testimony were within Vandeventer Avenue sewer district No. 1, were they not?
A. Yes, sir.
Q. Now, on the west of Sarah street, say at Morgan, there was a public sewer, was there not?
A. No, sir.
Q. I show you here a drawing, Mr. Wise, and see if you recognize it as being a tracing. (Handing witness a tracing.) Does that tracing show the situation of the territory represented here in regard to the Vandeventer Avenue sewer?

Mr. GROVER: What do you mean by "represented here"?
Mr. ROGERS: In the drawing.

A. Do you mean the surveys, the sewers or what?
Q. Does this properly show the course of the Vandeventer Avenue sewer from, say, Duncan avenue as far north as this tracing shows?

Mr. GROVER: Name the street.

(By Mr. ROGERS:)

97 Q. Fairfax avenue—is that as far as it goes?
A. Yes, sir; it is correct as far as it goes.
Q. West of Vandeventer avenue, say at Lindell boulevard—west of Vandeventer avenue there was a public sewer, was there not, as represented by this red line on this tracing?
A. Yes, sir.

(By Mr. GROVER:)

Q. You say there was? When was it built?
A. They were building it at that intersection there when we were building the Vandeventer Avenue sewer and it was built in sections up to where it crossed the creek here (pointing on tracing) and extended up.

(By the COURT:)

Q. What sewer is that?
A. The Mill Creek sewer.

(By Mr. ROGERS:)

Q. Represented by that bright red line there on the tracing?
A. Yes, sir.
Q. Then this pale red line represents the Vandeventer Avenue sewer?
A. Yes, sir.
Q. Now look at the figures on this tracing, Mr. Wise, and see if——
The COURT, interrupting: What do you mean by speaking of the Taylor Avenue red line?
Mr. ROGERS: I mean Vandeventer avenue. I said Taylor.
Q. I will ask you if you recognize this as being a tracing of the topographical map in the office of the sewer commissioner of the city of St. Louis?
A. Of course, after going into the details I know from the general appearance that it is about the appearance of the original topography of the ground.
Q. You don't mean Mr. Wise that this Vandeventer sewer had some low places west of Sarah street that were outside of the boundaries of the Vandeventer Avenue sewer district?
A. That it tapped some low places?
Q. Yes, sir; outside of the district boundaries.
A. No; not outside of the district.
98 Q. Then all these low places that you spoke of as being tapped by the Vandeventer Avenue sewer were within the Vandeventer Avenue sewer district No. 1?
A. Yes, sir.
Q. Now, going north on Vandeventer avenue from Duncan avenue, along the line of this Vandeventer sewer, the sewer had to pass a considerable rise in the ground, did it not?
A. Yes, sir; there was quite a hill along between Duncan avenue

and Olive street, or between Duncan avenue and Lindell avenue the highest point being about Pine street, and a pretty deep cut there through a rock excavation.

Q. What kind of a sewer was this Vandeventer sewer, Mr. Wise?

By Mr. GROVER: I object. What do you mean by "what kind of a sewer"?

The COURT: That question does not ask for anything.

Q. Does this Vandeventer Avenue sewer receive the drainage from any territory outside of the boundaries of the district as defined by the ordinances?

A. When it was first constructed it drained nothing outside.

By Mr. GROVER:

Q. Does it drain anything outside of the district as originally constructed now?

A. I think it does, some little.

Q. Is that drainage brought in by sewers constructed to connect with it?

A. Yes, sir.

(By Mr. ROGERS:)

Q. Now, Mr. Wise, didn't water from outside the district run through this sewer and go through the manholes—surface water?

Counsel for the defendant object as immaterial.

The court overruled the objection.

A. I must answer in the negative; there was no water drained into the Vandeventer Avenue sewer from outside the district. The fall which drained the water ran into the sewer at the junction of the Mill Creek sewer.

99 Q. Are you sure now and can state definitely and positively that no water in case of a flood or rain would run over the surface and come into the manholes of this Vandeventer sewer at any point?

Counsel for defendant objected as immaterial.

The court overruled the objection.

A. I must answer that this is not the case; there is a fall west of Vandeventer which takes that drainage and carries it off to Mill creek without going to Vandeventer, so that there is no surface drainage comes into the Vandeventer.

Q. Is the western boundary of this sewer district as fixed by ordinance at the top of elevation—west of it—so that no water could possibly run down the hill or incline west of it—surface water—and get into the manholes of the Vandeventer sewer—can you state that definitely and positively?

A. The surface drainage as I stated before, is in the district west of Vandeventer as far as Washington, and that is carried into Mill creek west of Vandeventer. Now, when you get as far as Morgan and drain each way into Sarah street and Vandeventer, the district

line is about on the limit of drainage on the west so that there is no run—the water comes across from the outside of the district into the district.

Q. Is that true, all along that sewer from Morgan up to Lucky, then west to Whittier, and then to St. Ferdinand—is that true, that this sewer is right on the line of drainage all the way?

A. The district line is the street line; it follows streets, and sometimes it may be a short distance east or west of that, but it is at the summit of that watershed.

(By the COURT:)

Q. Do I understand from you that there is a double system of sewers?

A. There is a double system north of Morgan.

100 Q. I mean one system for the surface and another for the house sewage?

A. No, sir.

Q. I thought you spoke of a sewer west of Vandeventer which carried the water down to the Mill creek?

A. Not a sewer, but the natural fall between Sarah and Vandeventer.

Q. Whereabouts is that?

A. It commences at Duncan avenue and Forest Park boulevard and crosses Pine street. You will also find a low place on Lindell avenue.

Q. Is there water running through there now?

A. There is a sewer there now; it is cut by the sewer.

Q. You mean this sewer?

A. No, not Pine street; it comes into Mill creek on Sarah street.

Q. Does this present Vandeventer Avenue sewer we are now talking about carry all the surface water in district No. 1?

A. Yes, sir; the Vandeventer carries the whole district.

Q. Then this low place you are speaking of in the west is not in the district?

A. No, sir.

(By Mr. GROVER:)

Q. I want to ask you about this district. Have you made an estimate of the area in acres of that Vandeventer Avenue sewer district No. 1?

A. Yes, sir.

Q. What is the area in acres?

A. About 525 acres.

Q. Does this drawing, which has been shown you in your cross-examination by Mr. Rogers, properly represent the lateral sewers in the territory covered by this drawing?

A. I don't see any lateral sewers drawn at all on that; where are they?

Q. I am asking you?

A. I don't see any. There were lateral sewers on all the alleys here and some of the streets, but not on here (referring to tracing).

Q. Then this drawing is not correct?

A. This one shows the main sewer, not the laterals.

101 Q. Then it is not a correct plat?

A. It don't embrace all the district.

Q. It don't show the lateral sewers in the district which it does purport to cover?

A. It don't show any lateral sewers.

Q. Then it don't show any lateral sewers?

A. No, sir.

ROBERT E. MCMATH, sworn on behalf of the defendants, testified as follows:

Direct examination by Mr. GROVER:

Q. Your name, sir?

A. Robert E. McMath.

Q. Your official connection with the city?

A. President of the board of public improvements.

Q. What was your connection with the city at the time the Vandeventer Avenue sewer was projected and constructed?

A. Sewer commissioner.

Q. I will ask you, Mr. McMath, if you, as sewer commissioner, at any time, made any examination to see whether or not the general public would be benefited by the construction of this sewer?

Counsel for plaintiff objected.

The court sustained the objection.

To which action and ruling of the court, defendant, by counsel, then and there duly excepted.

Q. Did the board of public improvements make any investigation or reach any conclusion as to whether or not the general public of the city of St. Louis would receive any benefit from the construction of that sewer?

Counsel for plaintiff objected.

The COURT: We have in evidence all the records of the board. The board, I suppose, speaks only through its record. We will confine the evidence to what the board did. I sustain the objection. That is to say, I don't object to any record, you can show any

102 official action of the board, but any action outside of the official record cannot be shown.

To which action and ruling of the court, defendant, by counsel, then and there duly excepted.

Cross-examination by Mr. ROGERS:

Q. Mr. McMath, was this Vandeventer Avenue sewer district No. 1 established in response to a petition from the property-holders in that district, asking for the sewer?

Counsel for defendant object as irrelevant, immaterial and incompetent.

The COURT: If that is a part of the record, it is competent.

(By Mr. ROGERS:)

Q. Does your recollection enable you to say whether the record shows that a petition was filed signed by the property-holders—there was a very large petition, was there not?

A. Yes, sir.

Counsel for defendant objected to the question, and asked that the answer be stricken out. The court sustained the objection, and the motion to strike out answer.

Q. Mr. McMath, how long have you been in the board of public improvements in the city of St. Louis?

A. Since 1883, excepting two years.

Q. You were, I believe, prior to that a civil engineer?

A. Yes, sir.

Q. And your business and your learning make you familiar with matters of sewerage and drainage?

A. It has been my business for over forty years.

Q. You know something, I suppose, about the values of real estate in the city of St. Louis, by reason of your connection with public improvements?

A. Yes, sir; I have a general idea.

Q. I will ask you to state if, in your opinion, the property
103 in the district known as "Vandeventer Avenue sewer district No. 1," was benefited by reason of the putting in of that sewer?

Mr. GROVER: I object; he has not shown that he is competent to show the value, and it is not the proper way to show it; he is asking for a conclusion.

The COURT: What has that question to do with the case, anyway; I sustain the objection.

(By Mr. ROGERS:)

Q. I believe that you were sewer commissioner at the time when this "Vandeventer Avenue sewer district No. 1" was established, were you not?

A. I was.

Q. You had something to do with superintending the construction of that sewer, and you know the sewer of your own knowledge by reason of your connection with it, do you not?

A. Yes, sir; I do.

Q. You drew the plans and profiles, did you, for that sewer district?

A. I laid out the plans.

Q. I will call your attention, Mr. McMath, to the figures contained in the special-tax bill giving the area of square feet as 16,706,365, and ask you if you know about how many acres that would be, or what the acreage of this sewer district was?

A. Sixteen million odd square feet of property.

Q. In addition to that, there were streets and alleys within this sewer district, in addition to this sixteen million odd square feet?

A. That would amount to probably four hundred acres of private property.

Q. State if you know about how many acres there were in Vandeventer Avenue sewer district No. 1, including both the streets and alleys and the private property within the district?

A. You get the acreage of the property by dividing by 43,560; the entire district including the surface of the streets and alleys is about 525 acres.

Q. Do you know the size of the different parts of this Vandeventer sewer district No. 1; I mean this main stem or trunk
104 and the laterals?

A. I could not speak of them by memory of my own; they are matters of record.

Q. Suppose this Vandeventer Avenue sewer is eight and a half feet in diameter at the point where it enters the Mill Creek sewer at Duncan avenue; would you say, as an engineer, that the main stem was too large for the purpose of draining 525 acres of ground?

Counsel for defendant objected.

The court overruled the objection.

To which action and ruling of the court defendant by counsel then and there duly excepted.

A. I proportioned it to make it just capable of carrying the drainage of 525 acres.

Q. Do you think that the proportion of eight and a half feet in diameter at that point is the proper proportion for a sewer capable of draining 525 acres?

A. I did, and do still.

Q. Those are according to the figures you made?

A. According to the computation made at the time to drain that area in the city of St. Louis.

Q. Mr. McMath, was the sewer (main trunk, laterals and all that) in Vandeventer Avenue sewer district No. 1, for that district alone?

Counsel for defendant objected as leading.

The COURT: The inquiry is proper, but the question is leading.

(By Mr. ROGERS:)

Q. You are familiar, I believe, with the work as to Vandeventer Avenue sewer, are you not?

A. I am.

Q. Well, what does your experience lead you to conclude concerning the proper proportions of that Vandeventer Avenue sewer, with reference to the area contained in it?

The COURT: He has answered that question squarely twice.

105 (By Mr. ROGERS:)

Q. Does that Vandeventer Avenue sewer, Mr. McMath, drain any territory outside of the boundaries of the district, as established by ordinance?

A. I think it does a few acres at the southern end of it, but a very few.

Q. About how many acres, Mr. McMath?

A. Perhaps twenty-five.

Q. Well, you say you simply think it does. Are you certain about that—have you any way of showing how many acres are drained there?

A. Well, I think from the south of Laclede avenue to the next street south, extending from the eastern boundary of the sewer district up to the summit 600 feet or so west of Grand avenue, that there has been a sewer built which brings in the drainage of a territory which is not in the sewer district, and I assume it took in, at the extreme, about twenty-five acres; I don't know precisely.

(By the COURT:)

Q. When the sewer was planned was it designed to take in these twenty-five acres?

A. This twenty-five acres lies immediately east; that could be taken in another direction; it would make no difference in the size of the sewer, whether it was laid down Cabanne avenue; I think, as a matter of convenience, it has been laid down to the Vandeventer sewer; simply because the property has not developed, that they have not built the sewer on Cabanne avenue.

(By Mr. ROGERS:)

Q. Did that small territory that was let into the Vandeventer Avenue sewer, or the provision made for it, increase the cost of the Vandeventer Avenue sewer district No. 1?

(By the COURT:)

Q. I asked whether, in planning and laying out this sewer, you designed it to carry this space you have spoken of.

A. Not especially; a sewer of that size is designed to carry a little margin, and this would be a very little margin; as I said, this was a piece of ground that could have been drained in other direc-
106 tions, if streets had been opened, and it had been designed to build a sewer on Cabanne, and it was run along Laclede and let into the Vandeventer Avenue sewer; it enters the eight and a half foot sewer, and its entrance there would not be felt, and a unit of twenty-five acres out of 525 would not make any difference in the estimated capacity of the sewer.

(By Mr. ROGERS:)

Q. Then the drainage of that small territory outside of the district has not added to the cost of the district, as a matter of fact?

A. It cut no figure in the original plan.

Counsel for defendant objected to the question and moved to strike out answer.

The court sustained the objection and motion.

Q. I will ask you to look at this plat and see if you can from it

explain the topography of the ground within the territory represented by this map (handing witness plat, same plat hereinbefore referred to)?

A. That plat don't show more than about a fourth or third of the Vandeventer Avenue sewer district No. 1, and it is not calculated to give any definite reliable information; it is nothing but confusion in using an imperfect plat.

Q. You mean as to explaining the topography of the whole district?

A. At the time that sewer was planned and constructed.

(By the COURT:)

Q. Were you familiar with the topography of this district before the sewer was built?

A. Yes, sir.

Q. What was the general lay of the land as to there being a system of drainage there?

A. If I had a general plan that would show that whole country I could show it in a very short while, but this shows nothing.

(By Mr. ROGERS:)

Q. Suppose this is Vandeventer avenue (pointing on said plan), and this Duncan avenue (pointing on another place on plan),
107 where do you get the territory on either side of Vandeventer avenue?

The COURT: I am asking a general question: I would like to know whether there was a drainage system through there and what was the character of it; it may be necessary for the court to determine the case of whether the charter calls for that; I don't know how that question can be determined unless by per cent.

WITNESS: I could use this plat so far as it goes.

The COURT: Answer the question any way you please.

WITNESS: I think the court is pretty well acquainted with the country. The Mill Creek north branch, as it is called, enters this district at the intersection of Duncan avenue and Vandeventer avenue; here is the line of that creek (indicating on plan). A little north of Pine street that natural water-course divided: one branch ran up northwardly and eastwardly and came to Vandeventer avenue at Washington; the other ran westwardly, crossing Sarah street a little south of Delmar boulevard, and crossed Lindell boulevard and proceeding diagonally across the country, crossing Maryland and McPherson avenues, following pretty closely along the line of Whittier street until it got to Fairfax, then it meandered off northwestwardly.

Q. What was the course of the water when it ran through that? Was it towards the Mill Creek sewer, running in that direction? These two branches came together and ran in a southerly direction?

A. After they united they formed what was considered the north branch of Mill creek. Now I think you will get an idea of the situation a little better if you will consider where these summits run;

between different courses of drainage. Suppose the fingers of my hands are the highest points and between the fingers the depressions, now then, one of the fingers in this case would come up in
108 a northeastwardly direction coming to Washington avenue to Vandeventer, it continued pretty closely following the line of Vandeventer avenue up as far as Page; west of Vandeventer there was a rise of ground between Vandeventer and Sarah, commencing immediately north of Lindell; crossing McPherson at Westminster and then after getting beyond Morgan street, it gradually fell down and became less prominent; then there was from the westward a trunk of this drainage system which I spoke of; on Whittier street there was one of these branches that ran up northeastwardly and crossed Sarah at Morgan. When this district was laid out, the effort was to meet this sanitary necessity, and it was so laid out as to include every possible inhabited dwelling-house there was in that section; in fact, there was not a half dozen outside of it. So that in laying out this system the sewers, especially to the west of Sarah—those laterals were extended beyond the divide, coming just as far as the depth of the sewer would afford a reasonable and sufficient drainage to the property; so that in some cases it ran 300 and 400 feet beyond the natural divide of the ridge; so that instead of any water being able to come from outside the district, this district reached over into the adjoining watershed. Now that is true throughout the whole extent of the western branch of this sewer which went out Morgan street and then as soon as it had gotten out of Morgan street it commenced to take in the territory from the west, (some of that territory extends beyond Whittier, I think nearly to Pendleton,) with a view of bringing in everything which possibly could be reached. That is the reason why the sewer was driven through this hill intervening between Sarah and Vandeventer on Morgan—in order to tap this supplementary drainage which was made necessary at that point. That enabled us
109 to bring into the boundaries of this district what had been known as "Elleardsville" or "Butchertown," as it is sometimes called. The western boundary of the district was the boundary lines of previously created districts, which, like this, had extended beyond the course.

Q. Take the line of the sewer from Duncan avenue north at Morgan north on Sarah—then on Lucky—then Whittier; how nearly, if at all, does it follow the natural drainage that existed before it was built?

A. The bringing of the drainage from Sarah street and all the territory which depends on that, over to Vandeventer was against nature, because nature had provided for it to go in a southwesterly direction; but that district was laid out with a view of including within the borders of the district all the territory which could be drained by the sewer on Vandeventer avenue.

Q. Was it intended to be used hereafter for other portions?

A. No, sir: it is not to be used for the benefit of any other territory than that contained in the district with the solitary exception, as I would speak of it, of two blocks; that was a block which lies

between Olive and Washington, Sarah and Vandeventer; and the block which I spoke of awhile ago south of Laclede between Laclede and Forest Park boulevard.

Q. Can you state whether any of the laterals emptying into the Vandeventer sewer are themselves tapped by lateral sewers?

A. No, sir; in no instance.

(By Mr. ROGERS:)

Q. About the part of the territory represented in this portion of the map. Now, you say the natural depression beginning at Duncan avenue and Vandeventer—I believe you ran your finger along in this direction (indicating on map)?

A. Yes, sir; it does not represent a continuous water-course, but here is the lowest point on the map at the intersection of Vandeventer and Duncan avenue-. The line of greatest depression
110 continues singly up to the crossing of Laclede avenue about midway between Vandeventer and Sarah; there it divided and ran—one branch parallel to Vandeventer avenue, nearly up to McPherson, and then it swung a little nearer to Vandeventer until it crossed Olive street, probably 300 feet or so west of Vandeventer and then diagonally across; so that at Washington avenue, and north there was originally a good place to hunt snipes.

(By the COURT:)

Q. Take the point between Vandeventer and Sarah and Duncan and Lindell; where was the western line of this district?

A. The western line of the district from Duncan avenue to Westminster was probably the west line of Vandeventer avenue.

Q. Where did all that drainage go to—where does it go to now?

A. Nearly all of it goes down to the sewer on Sarah street, necessarily.

Q. Starting with that last point you spoke of and then following up the water-course there you spoke of, does that water go into this sewer, or does it go to the Mill Creek sewer?

A. To the Mill Creek sewer; I think that whole part of this block has no sewer.

Q. That district has no sewer running into the Vandeventer Avenue sewer at all?

A. No, sir.

Q. The boundary is on the west line of Vandeventer avenue?

A. Yes, sir.

Q. I will ask you this question. Does this sewer, built on Vandeventer avenue and connecting at Duncan avenue, carry the drainage which originally went through that water-course, and take the place of that water-course?

A. It carries some of it; that is, it carries what did reach that water-course.

(By Mr. GROVER:)

Q. You say it carries that which went to a certain point; that is the point we want.

(By the COURT:)

Q. I will ask this question: What portion of the original drainage which went over the natural surface through the depressions
111 of which you have been speaking, is now carried by the Vandeventer sewer, if any?

A. A considerable less than one-half, possibly one-third; I make that statement on the per cent. of the areas.

(By Mr. ROGERS:)

Q. I will ask you about this depression on Laclede avenue you say was and is, west of Vandeventer avenue. I will ask you to state approximately how far west of Vandeventer avenue the lowest point of that depression is at Laclede avenue—how far west of Vandeventer avenue is that?

A. I think it is about six hundred feet.

Q. Then that old run or natural course of drainage was at Laclede avenue, about six hundred feet west of Vandeventer?

A. I think it is a little over 600 feet, 200 feet is an inch. That is about 700 feet there.

(By Mr. GROVER:)

Q. You stated in answer to a question by his honor that it would be impossible to get into this drainage district now, any drainage from the outside.

A. I said very nearly that.

Q. Now, would it not be possible to get some drainage into this district, as you said in regard to that drainage beyond Sarah street, against nature?

A. No, we exhausted the "against nature" possibilities at that time.

Q. You could not dig a ditch anywhere deep enough to get the drainage outside of this district?

Counsel for plaintiff objected.

The court overruled the objection.

A. It cannot be done.

Q. Then the "against nature" process could not be repeated in this way?

A. No, sir.

Q. Now did you ever see that Vandeventer Avenue sewer full of water at any time?

A. It is hard to answer that question; literally I did not.

Q. I am asking for it literally?

A. I have known it to be full by good and *and* sufficient evidence; I cannot say that I ever saw it.

112 Q. I ask if you ever saw it full of water?

A. No, sir.

Q. Did you ever take the trouble to examine that sewer after a flood—go out and look at it? I don't mean reports, but did you ever go and look at it after a hard rain?

A. I have been along the course of it after a hard rain.

Q. Have you looked into to see how high the water was in it?

A. I don't know of any convenient way by which I could get down and see it.

Q. The question is, did you see it?

A. No, sir.

Defendant rested here.

This was all the evidence offered in the case.

Thereafter, on the 12th day of June, 1899, the court entered in said cause its findings, judgment, and decree in favor of the plaintiff and against defendant on plaintiff's cause of action; and against the defendant and in favor of plaintiff on defendant's cross-bills; which findings, judgment and decree is as follows, to wit:

(See page 22, *ante*, for judgments.)

To such findings, judgments and decrees defendants then and there duly excepted at the time in each case.

Thereafter, within four days from the rendition and entry of said findings, judgments and decrees, to wit, on the 16th day of June, 1899, and at the same term of the said court, the defendants filed in said causes motions for a rehearing and new trial and in arrest, which motions for rehearing and new trial and in arrest are as follows, to wit:

HEMAN
vs.
SHUMATE ET AL.

Motion for New Trial.

And now comes John L. Shumate, one of the defendants in the above-entitled cause, and moves the court to set aside the findings and judgment and decree entered herein, and to grant to this defendant a rehearing of all the issues of law and fact in this case; and for grounds of this motion alleges the following:

(1.) There is no evidence to sustain the findings, judgment and decree of the court.

(2.) The judgment, findings and decree are against the evidence, and against the weight of the evidence.

(3.) The findings, judgment and decree should have been against the plaintiff and in favor of defendants on plaintiff's cause of action.

(4.) The findings, judgment and decree should have been in favor of the defendants, and against the plaintiff on defendants' cause of action and cross-bill.

(5.) The court admitted against defendants' objection illegal evidence offered by the plaintiff.

(6.) The court rejected illegal evidence offered by the defendants.

113 (7.) It was error in the court to find and decree that the Vandeventer Avenue sewer constructed in Vandeventer Avenue sewer district No. 1, in the city of St. Louis, under the ordinances set out in plaintiff's petition and appearing in the evidence and under the contract set out in plaintiff's petition, was a district

sewer. The findings and decree of the court should have been that the said sewer was a public sewer, and that the cost of the construction thereof should have been paid by the city out of public funds, and could not legally be assessed and taxed against defendants, or against defendants' property described in plaintiff's petition.

(8.) It was error in the court to find and hold, upon the law and evidence in this case, that the public of the city of St. Louis, and the city of St. Louis itself, was not benefited by the construction of the said Vandeventer Avenue sewer; it appearing fully and exclusively from the evidence that the said sewer was projected and recommended by the board of public improvements, as a sanitary measure, necessary for the welfare of the whole people of the city of St. Louis, and that, in conformity with such recommendation of the board of public improvements, the municipal assembly, by the ordinances aforesaid, directed and authorized the construction of said sewer for the purpose for which it was recommended; it appearing further from evidence that 125 acres of the property of the city of St. Louis, or 125 acres of the public property of the city of St. Louis, was intended to be, and was actually drained by the said Vandeventer Avenue sewer, through which all the drainage and sewage from the said 125 acres of public property was carried off and conveyed into the Mill Creek sewer, the latter being a public sewer of the city of St. Louis.

(9.) It was error for the court not to hold that the pro-
114 visions of sections 18–21–22–24 and 25 of article VI of the charter of the city of St. Louis, and that ordinances 13076, 13482, 14625, and ordinances number 13596 and 14630, and the contract with the plaintiff made thereunder and set out in plaintiff's petition, and any assessment against defendants or their property for the cost of the construction of said sewer, were null, void and of no effect, for the reason that they are repugnant to and in contravention of the 14th amendment of the Constitution of the United States, and contrary to the provisions of sections 20 and 21 of article II of the constitution of the State of Missouri.

(10.) The court should have found and decreed, upon the facts and law in this case, that, as the general public of the city of St. Louis, and the city of St. Louis derived benefit from the construction and use of said sewer, the city, and the city alone, was liable for the value of the benefit inuring to the city and to the public of the city, by the construction and use of said sewer, and that the whole cost of the construction of said sewer, should not have been assessed against the property and property-holders in said district, including this defendant and his property.

(11.) The court should have found and decreed, upon the facts and law in this case, that this defendant and his property could not be made liable for any part of the cost of the construction of said sewer, beyond the actual benefit, if any, resulting to defendant's property from the construction of said sewer.

(12.) The court should have held that, by reason of the failure of the foregoing provisions of the charter of the city of St. Louis, and of the said ordinances of the city of St. Louis, to require and provide that there should be an ascertainment and determination of the

fact, whether or not the city and general public was benefited
115 by the construction of said sewer, said provisions of said charter and said ordinances were null and void.

(13.) The court, upon the evidence and law in this case, should have found and decreed that the said provisions of said charter and of said ordinances and any alleged assessment thereunder, compelling the property-holders in said district, including this defendant, through their property, to pay and bear the entire cost of the construction of said sewer, when the evidence showed that the city of St. Louis, and the general public of said city, were actually benefited by the construction and use of said sewer, necessarily results in depriving this defendant of his property without due process of law, and in the taking of defendant's said property for public use without just compensation, and in depriving this defendant of the equal protection of the laws, contrary to the provisions of the 14th amendment of the Constitution of the United States, and contrary to the provisions of sections 20 and 21 of the constitution of the State of Missouri.

(14.) It was error in the court to hold that the said Vandeventer Avenue sewer was not of larger dimensions than was necessary to carry off the drainage of the sewage of the district created by the said ordinance; the facts shown by the evidence being that the board of public improvements permitted the drainage and sewage of 25 acres of land not in the limits of said district as created to be carried into said sewer.

(15.) The additional property, to wit, the said 25 acres drained into said sewer, should have been taxed along with the property contained within the limits of said district, and the failure to do so constitutes unequal taxation against the property within the limits of said district, and deprives the defendant of the equal protection of the law.

(16.) Under the provisions of the said sections of the charter
116 of the city of St. Louis, and under the said ordinances, neither the defendant nor defendant's property could become liable for any part of the cost of the construction of said sewer until and unless the cost of the construction of said sewer shall have been assessed by the board of public improvements against said property. Such assessment is a fundamental requirement as a basis of liability or lien for the cost of such construction. Plaintiff's petition did not allege that the board of public improvements had made such assessment. Defendant's answer specifically denied that the board made such assessment. The records of the board of public improvements, produced in the evidence, and the testimony of the secretary of said board, Emory S. Foster, discloses the fact that the board of public improvements had never made any such assessment.

It was error in the court, in view of that situation, to decree and hold that the special-tax bill was *prima facie* evidence that an assessment had been made by the board of public improvements, when no such allegation was contained in the petition of the plaintiff. It was error in the court to hold that the said tax bill was *prima facie* evidence of such fact, and in that way hold that the tax bill was

prima facie evidence of an essential, material fact, which had not been alleged in plaintiff's petition.

(17.) The official acts of the board of public improvements of the city of St. Louis must appear on and from its own records. The records of said board, offered in evidence by the defendants, and testimony of Emory A. Foster, secretary of said board, discloses the fact that no assessment of the cost of the construction of said sewer was ever made by the said board against the property in said sewer district, and against defendants' said property, even if the
117 said tax bill could be held to be *prima facie* evidence of an assessment by the said board, when no such assessment is alleged in plaintiff's petition; such *prima facie* evidence was overcome and rebutted by the direct evidence, when no such assessment had ever been made; and the court *could* have found and decreed in the evidence that the board of public improvements had never made an assessment of the cost of the construction of said sewer against the said property.

HEMAN
vs.
SHUMATE.

Motion in Arrest.

And now comes the defendant, John L. Shumate, and moves the court to arrest the judgment entered in the above-entitled cause, and for grounds of this motion alleges the following:

(1.) Plaintiff's petition does not state a cause of action.

(2.) Plaintiff's petition does not allege that the board of public improvements ever made any assessment of the cost of the construction of the Vandeventer Avenue sewer, in Vandeventer Avenue sewer district No. 1, against the property-holders or their property, including this defendant's property, therein situated.

(3.) As neither defendants nor their said property could be made liable for any part of the cost of said construction without a legal assessment being made therefor by the said board, the failure to allege such assessment in plaintiff's petition is, in fact, the failure to allege *and* liability against defendants or their property, and the special-tax bill is not *prima facie* evidence of any necessary facts not alleged and set out in plaintiff's petition.

118 (4.) The allegation of such assessment by the board of public improvements, being a necessary and essential allegation to sustain any liability against defendants or their said property, and the petition containing no such allegation, the said special-tax bill was not *prima facie* evidence against defendants or their property that any such assessment was ever made.

Thereafter and at the same term of the court, to wit: on the 23rd day of June, 1899, the court overruled defendants' said motions for rehearing and for a new trial and in arrest; to which orders, judgments and decrees, overruling defendants' said motions for rehearing and for new trial, and in arrest, defendant- then and there duly excepted at the time.

Said orders, judgments, and decrees, overruling defendants' said motions for rehearing and for new trial, and in arrest, are as follows, to wit:

AUGUST HEMAN
vs.
JOHN L. SHUMATE.

It is hereby ordered by the court that the defendant's motion for a new trial and motion in arrest of judgment, heretofore filed herein, be and the same are hereby overruled.

Thereafter, on the 30th day of September, 1899, the said defendant prayed the court for an order extending the time for him to present and file his bill of exceptions in the above-entitled cause for the period of sixty days from said 30th day of September, 1899; and at the same time filed his affidavit for appeal from
119 said finding, judgment and decree to the supreme court of the State of Missouri. Thereupon the said court by its order and decree, extended the time for defendant to present and file his said bill of exceptions, sixty days from said 30th day of September, 1899, and entered orders and decrees granting to defendants appeal from said judgment, finding and decree to the *decree to the* supreme court of the State of Missouri.

Thereupon now, on this 29th day of November, 1899, and within the period of sixty days from said 30th day of September, 1899, the said defendants come and presents his bill of exceptions and ask that the same may be signed and sealed and made part of the record herein, which is done this 29th day of November, 1899.

FRANKLIN FERRIS, *Judge*. [SEAL.]

In the Circuit Court, City of St. Louis, State of Missouri.

AUGUST HEMAN, Plaintiff,
vs.
JOHN L. SHUMATE and HUNTINGTON SMITH, Defendants. } No. 84205. Division No. 6.

In the Circuit Court, City of St. Louis, State of Missouri.

AUGUST HEMAN, Plaintiff,
vs.
NATHAN D. ALLEN and HUNTINGTON SMITH, Defendants. } No. 84212. Division No. 6.

Stipulation.

It is hereby agreed and stipulated by and between the parties plaintiff and defendant in both the above-entitled causes, that, the above causes having been set for trial on the same day, in the same division of the circuit court of the city of St. Louis, and having by consent of parties been tried together, by which con-
120 sent and agreement it was further stipulated that the evidence taken by both parties at the trial, and the rulings on the evi-

dence, and the exceptions to such court rulings, might be, should be, for the purposes of said trial, considered as taken and made in both of said causes.

Now, therefore, the said parties now further stipulate and agree with each other that the above and foregoing bill of exceptions was intended to be, and shall be, filed in each of the above-entitled causes, and is, and shall be defendants' bill of exceptions in each and both of said causes, and shall constitute and shall be defendants' bill of exceptions in each and both of said cases for the purposes of defendants' appeals in the supreme court of Missouri; and may be considered by said supreme court as defendants' bill of exception- in each and both of said cases; and in making up transcripts of the records for the purposes of said appeal, for the supreme court of Missouri, if said appeal shall be taken to said supreme court on full certified transcripts from the said circuit court; or in making up of abstracts of the record, or in making up the printed record for the purposes of said appeal in said cases in said supreme court, under the rules thereof, if full certified transcripts shall not be filed in said supreme court, it shall not be necessary to copy or to make an abstract, or a printed record of said bill of exceptions twice, but only once; and the appeals in both of said cases may be submitted to said supreme court for hearing and decision, upon the above and foregoing bill of exceptions filed in both cases.

HICKMAN P. RODGERS,
Attorney for Plaintiff.
HIRAM J. GROVER,
Attorney for Defendants.

121 And on the same day the further following proceedings were had in said cause, to wit:

AUGUST HEMAN, Resp.,)
vs.)
JNO. L. SHUMATE, App.)

Come now the said parties, by attorneys, and after arguments herein submit these causes to the court.

And afterwards, to wit, on the 4th day of June, 1900, the further following proceedings were had in said cause, viz:

AUGUST HEMAN, Respondent.)
vs.) Appeal from Circuit Court, City of St. Louis.
JOHN L. SHUMATE, Appellant.)

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said circuit court of the city of St. Louis rendered, be in all things affirmed and stand in full force and effect, and that the said respondent recover against

the said appellant his costs and charges herein expended, and have therefor execution.

(Opinion filed.)

Which said opinion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, Court in Banc, April Term, 1900.

AUGUST HEMAN, Respondent,
vs.
JOHN L. SHUMATE and HUNTINGTON SMITH, Appellants.

This is a companion case to the case of August Heman *vs.* Nathan D. Allen and Huntington Smith, decided at the present term and reported at page —, Mo. —, and for the same reasons assigned in that case it is affirmed.

All concur.

G. D. BURGESS, *J.*

122 In the Supreme Court of Missouri, Court in Banc, April Term, 1900.

AUGUST HEMAN, Respondent,
vs.
NATHAN D. ALLEN and HUNTINGTON SMITH, Appellants.

In Banc.

This is a suit upon a special-tax bill issued by the president of the board of public improvements against the property of defendants for the sum of forty-nine dollars and four cents for its proportionate part of the cost of constructing a district sewer in Vandeventer Avenue sewer district No. one, in the city of St. Louis.

The answer sets up defences which are equitable in their character, and then, by way of cross-bill, asks for a decree cancelling and annulling the tax bill and lien.

The trial resulted in a judgment for plaintiff for the amount of his claim, and adjudged and decreed it to be a first lien against the property described in the petition.

After unsuccessful motions for a new trial and in arrest, defendants appeal.

Objection is taken to the petition upon the ground that it does not state a cause of action, in that it does not allege that the board of public improvements made the assessment of the entire cost of the construction against the property in the sewer district, but alleges that the president of said board computed the cost thereof and levied and assessed the same as a special tax. Under section 22, art. 6, of the charter of the city of St. Louis, before a lien can attach to property in a taxing district for the cost of the construction of sewers the board of public improvements must make an assessment of the entire cost of construction against the property liable for the
123 cost of construction. The tax bill which was put in evidence shows that the board of public improvements did assess

the costs of the sewers of said district, and, as no objection was taken to the petition by demurrer, the defect was cured by the judgment. Section 2313, Revised Statutes 1899, provides that no judgment after trial shall be reversed, impaired, or in any way affected for omitting any allegation or averment without proving which the triers of the issue ought not to have given such a judgment, and it is clear that the court ought not to have given the judgment that it did give in the absence of proof of the assessment of the entire cost of the sewer by said board. So that this defect in the petition is now unavailable to defendant-. But defendants say that, as the petition does not state a cause of action, the court erred in admitting in evidence over their objection the special-tax bill sued upon.

The record, however, fails to show that an objection was made to the introduction in evidence of this bill. It is true it shows that when plaintiff, who was a witness in his own behalf, was testifying, and was handed the tax bill by his attorney and asked if the signatures of Flad and Campbelle, as president of the board of public improvements and comptroller, respectively, as shown by the tax bill, that defendant- objected upon the ground that the evidence was "incompetent, irrelevant, and immaterial," but these objections did not go to the introduction in evidence of the tax bill itself and cannot now be so considered.

It is argued by defendants that the sewer for the construction of which in part the tax bill sued on was issued is a public sewer, and should be paid for out of the public funds and not by the assessment of the property-owners. That the municipal authorities undertook by ordinance to establish Vandeventer Avenue sewer district number one is not questioned, but the contention is that the facts and circumstances in evidence show that the sewer is a public sewer, and that as the cost for the construction of such sewers can only be paid out of the revenues of the city that the tax bill
124 is void.

Section- 21 and 22 of article VI, scheme and charter, define "public and private sewers." Section 21 provides that "public sewers shall be established and constructed along the principal courses of drainage, at such times, to such extent, of such dimensions and material and under such regulations as may be provided by ordinance, to be approved by the board of public improvements, and there may be constructed such branches to sewers already constructed, or to be constructed, as may be considered expedient by said board."

Section 22 provides that "district sewers shall be established within the limits of districts, to be prescribed by ordinance as approved by the board of public improvements, and so as to connect with a public sewer, or some natural course of drainage. Such district may be subdivided, enlarged or changed, upon the recommendation of said board, by ordinance, at any time previous to the construction of the sewer therein. The assembly shall cause sewers to be constructed in any district wherever a majority of the property-holders resident therein shall petition therefor, or whenever the board

of public improvements shall recommend it as necessary for sanitary or other purposes; and the character, dimensions and material of such sewer shall be prescribed and may be changed, diminished, enlarged or extended, and such sewer shall possess all requisite laterals, inlets and other appurtenances."

These sections provide for the payment of the cost of public sewers by appropriation out of the public revenue and of the cost of district sewers by special tax bills against the property in the sewer district.

It will be observed that by these sections almost unlimited power invested in the municipal authorities in the location and building of public and district sewers, and, as to the latter, there is no restriction as to their size or cost.

125 Yet it is argued by defendants that, because the construction of the sewer was a sanitary measure, it was a public benefit, and therefore a public sewer, and that because the main stem of the sewer is eight feet wide, and connected with lateral sewers of varying length, the main stem is at all events a public sewer and the lateral sewers district sewers. As to the first proposition, it is refuted by the article and section of the charter which authorize the construction of district sewers whenever the board of improvements shall recommend it as necessary for sanitary purposes.

It thus seems clear that at least one of the chief objects in the construction of the sewer in question—that is, for sanitary purposes—was that for which the city was authorized to construct it.

With respect to the contention that because the main stem of the sewer is eight feet wide it is a public sewer, it is only necessary to say that of its dimensions the board of public improvements was under the charter of the city, the sole judges, and their acts in this collateral way not subject to attack.

So with respect to the assertion that part of the sewer in question is a public sewer, because it is the main stem, and that the lateral sewers connecting with it are district sewers. This position seems to us to be alike illogical, for the reason that the charter provides that all district sewers shall be constructed with all requisite "laterals, inlets, and appurtenances," and the connection of lateral sewers with the district sewer could have no tendency towards converting the district sewers into a public sewer.

Nor does the fact that twenty-five acres of land which were not included in the original lines of the sewer district have subsequently been drained into this sewer affect the rights of the parties to this suit.

126 Their drainage connections with the sewer in question have been made since the sewer district was established, the building of the sewer ordered by the board, the work done, and the tax bill sued upon issued for the work, and it is in no way affected thereby.

"The legislature in the exercise of its power of taxation has the power to direct the whole or part of the expense of a public improvement, such as the laying out, grading, or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the

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determination of the territorial district which should be taxed for local improvements is within the province of legislative discretion, and when it determines what lands which might be benefitted by the improvement are in fact benefitted its determination is conclusive upon the owners and the courts." 2 Beach on Public Corporations, sec. 1175, and authorities cited; and, as a general rule, in the absence of fraud in establishing a sewer district or in letting the contract for its construction or unreasonableness of the ordinances providing for the establishing and constructing the sewer, courts will not interfere.

The case of Heman *vs.* Handlan, 59 Mo. App., 492, relied upon by defendants, announces a different rule. That case was a suit upon a special tax bill issued against defendant's property for its proportionate share of the costs of building this same sewer. No instructions were asked or given upon the trial, which resulted in a judgment for the defendant therein. The court said: "When an action at law is tried without error and no instructions are asked or given, the judgment of the trial court will be upheld on appeal, if it can be sustained on any possible theory of law applicable to the facts." The court held that as there was evidence tending to show that the sewer was a public sewer, and that the ordinance by which it was designated a district sewer was oppressive, that the finding and judgment of the court would not be disturbed. This decision in holding that the ordinance under consideration may be declared void merely because it is oppressive is, we think, in conflict
127 with the great weight of authority and supported by none.

The municipal authorities of the city of St. Louis have the same authority under its charter to establish sewer districts and to provide for the construction of sewers therein that they have to open, grade, and otherwise improve its streets, and it was held by this court in the case of Skinker *vs.* Heman, 148 Mo., 349, that "the general rule in this State is that with the exercise of such power the courts will not interfere; but when it appears that an ordinance passed in pursuance of such power is the creature of fraud or is the product of legislative whim or caprice merely and in violation of common right, imposing a burden upon the citizen without any corresponding benefit to him or the community of which he is a constituent, the courts will interfere for his protection."

Morse *vs.* Westport, 136 Mo., 276, was a suit to restrain the defendants, The City of Westport, its engineer and board of public improvements, from letting contracts under ordinances to macadamize certain blocks on McGee street. The proposed street improvements were to cost $5,274, making the special tax amount to more than $2.10 per front foot at any part of the improved street. The local municipal body had by ordinance ordered the improvements. The court held that even conceding the propriety or reasonableness of the exercise of the taxing power by the city open to review by the courts that the ordinance then under review was not an unreasonable exercise of municipal power.

In the case of Johnson *vs.* Duer, 115 Mo., 376, it was held that

where the authority of establishing sewer districts is vested by the legislature in the city council the action of such council is not subject to collateral attack.

So in The City of Kansas *vs.* Richards, 34 Mo. App., 521, it is held "that whether a contemplated improvement within a municipal corporation partaking in nearly equal proportions of a benefit
128 to the public and a special benefit to the property of a local district ought to be made a public charge or be made at the expense of the property specially benefitted is a question for the discretion of the governing power of the municipality, and this discretion, when exercised, is not the subject of review by the courts." To the same effect is Moberly *vs.* Hogan, 131 Mo., 19.

We therefore conclude that the municipal authorities of the city of St. Louis were vested with the exclusive power of establishing Vandeventer sewer district No. one as a district sewer, and that their acts in so doing, in the absence of fraud, is conclusive upon the courts in this action.

It is also contended by defendant- that section 22 of article 6 of the city charter, *supra*, which provides, among other things, that "as soon as a district sewer, with its inlets, manholes and other appurtenances is fully completed, said board (public improvements) shall cause to be computed the whole cost thereof, and shall assess it as a special tax against all the lots of ground in the district respectively, without regard to improvements and in proportion *as* their respective area bear- to the area of the whole district, exclusive of the public highway," and *to* the ordinances authorizing the construction of the Vandeventer Avenue sewer in pursuance thereof are violative of section 1 of the 14th amendment of the Federal Constitution, which provides that "nor shall any State deprive any person of life, liberty, or property without due process of law," and also of the constitution of this State, in that by their terms a betterment tax is assessed against the property of defendants without regard to the question of corresponding benefits and without notice of hearing and opportunity to contest the existence of benefits to their property or fairness of their apportionment between the several owners of the property assessed.

129 In Lockwood *vs.* City of St. Louis, 24 Mo., 20, it was said: "These special assessments are found in the English law, and have prevailed, it is believed, in most, if not all, of our American States, and their validity, when assessed as in this instance, cannot be questioned under our constitution. Their intrinsic justice strikes every one. If an improvement is to be made, the benefit of which is local, it is but just that the property benefitted should bear the burden. While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the few." The power to levy assessments for local improvements belongs to the legislative, which is the taxing power, but which may be delegated by that branch of the government to municipal corporations, which may, in their discretion, impose the whole or any part of the cost of such improvement against adjoining property, provided always that the assessments for benefits be not in substantial excess of the benefit

received. Garrett *vs.* City of St. Louis, 25 Mo., 505; City of St. Joseph, to use of Gibson, 106 Mo., 437; Morgan *vs.* Hogan, *supra.*

Rutherford *vs.* Hamilton, 97 Mo., 543, was a suit upon a special-tax bill issued by the city engineer of the city of St. Joseph in payment for a lateral sewer constructed for the purpose of drainage of adjacent property, of which the defendant owned a part. The defense interposed was that the act under which the sewer was constructed was unconstitutional "because the cost of the sewer was apportioned by the city engineer against the property fronting on the improvement in proportion to the frontage of each lot without considering the amount of actual benefits conferred by the sewer on each lot-owner; and it was held that the constitutionality of such an act was no longer an open question in this State, and that such an assessment was conclusive on the property-owner as to the amount of benefit which his property derived from the improvement.

130 So in Keith *vs.* Bingham, 100 Mo., 300, it was ruled that the fact that the street did not benefit but damaged the property sought to be charged with the tax bill was no defense to an action on the latter.

The same doctrine is announced in Nevada *vs.* Eddy, 123 Mo., 546.

It is upon the principle that property assessed for local improvements derives an equal or greater benefit from the improvements than the amount assessed against it, of which the board of public improvements are the judges, that special-tax bills for street improvements are sustainable under the taxing power, and where that power has been regularly exercised the propriety of the special tax is not subject of review by the courts.

Where private property is benefitted by public improvement the assessment against it by the proper authorities for its proportionate share of the cost of the improvement not exceeding the benefit which the property derives by reason of such improvement does not in any way increase the burdens of the owner as a tax-payer, and is not the taking of private property without due process of law, but is simply an assessment for benefits. The benefits to the property by reason of the improvements compensates for the assessment.

We are, however, referred to — number of decisions of Federal and State courts which, it is asserted, announce a different rule, among which Norwood *vs.* Baker, 172 U. S., 269, is the leading one. That case arose out of the condemnation of certain lands for the purpose of opening a street in the village of Norwood, a municipal corporation in Ohio.

Ellen R. Baker owned a tract of land in said village through which the village authorities desired to open a street called Ivanhoe avenue, and for that purpose condemned a strip fifty feet wide through her land. They then by ordinance assessed upon

131 her, abutting on each side of said street, an amount covering not simply a sum equal to that paid for the land taken for the street, but in addition the costs and expenses connected with the condemnation proceedings, and the validity of this ordinance was

assailed upon the ground that it was in violation of the fourteenth amendment of the Constitution of the United States.

The constitution of Ohio provides that where private property shall be taken for public use "compensation therefor shall first be made in money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owners."

Cities and villages in Ohio are by statute given power to lay off, establish, open, widen, and extend public streets and to condemn land for that purpose.

This statute also provides that where land is appropriated for opening or extending a street the council may assess the cost and expenses of such appropriation or acquisition and of the improvement or of either upon the general tax-list, and in all such cases and also in all cases where an improvement of any kind shall be ordered and is made to an existing street the expense thereof, when not assessed as a general tax to be paid by the municipality generally, "shall be assessed by the council on the abutting and such adjacent and contiguous and other benefitted lots and lands in the corporation, either in proportion to the *benefitted lots and lands in the corporation, either in proportion to the* benefits which may result from the improvement, or according to the value of the property assessed, or by the front foot of the property bounding and abutting upon the improvement, as the council by ordinance setting forth specifically the lots and lands to be assessed may determine before the improvement is made."

In the condemnation proceeding Mrs. Baker was allowed $2,000 for the strip of land taken, irrespective of any benefit to her
132 of the improvement. The village then assessed on her land which abutted on the strip taken the $2,000 paid to her and all the cost attending the condemnation proceedings, which amounted to $218.58.

The court held that the assessment, being by the front foot of the property bounded and abutting upon the improvement, "was under a rule which excluded any inquiry as to special benefits, the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefit accruing to the abutting property therefrom, to take private property for public use without compensation."

That case has since been followed in Fay *et al. vs.* City of Springfield *et al.*, 94 Fed. Rep., 409; Charles *vs.* Merriam, 98 Fed. Rep., 166; Lyon *vs.* Towandona, 98 Fed. Rep., 361; Lolb *vs.* Trustees, 91 Fed. Rep., 37; Cowley *et al. vs* City of Spokane *et al.*, 99 Fed. Rep., 840; Sears *vs.* Street Comm'rs, 53 N. E. Rep. (Mass.), 876; Hutchison *vs.* Storie, 92 Tex., 685.

But the facts upon which the case was decided are so unlike the facts in the case at bar that we do not think it controlling authority in this. In that case there was assessed upon Mrs. Baker's land, which abutted "on each side of the new street, an amount covering not simply a sum equal to that paid for the land taken for the street, but, in addition, the costs and expenses connected with the condemnation proceedings," the result of which was that the village of Nor-

wood got her fifty-foot strip of land for nothing and charged her $218.58 for the privilege of taking it, while in the case at bar defendant's benefits were $49.04 more than the damage to his property. Moreover, the decision was by a divided court. Besides, if it is to be interpreted as holding that the front-foot or area rule is violative of the fourteenth amendment to the Federal Constitution,
which prohibits any State from depriving any person of his
133 property without due process of law, it is in conflict with the
prior ruling of that court in Spencer *vs.* Merchant, 125 U. S., 345, in which it is said:

"The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, or repairing of a street, to be assessed upon the owners of land benefitted thereby, and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. Willard *vs.* Presbury, 14 Wall., 676; Davisson *vs.* New Orleans, 96 U. S., 97; Mobile County *vs.* Kimball, 102 U. S., 691, 703, 704; Hagar *vs.* Reclamation District, 111 U. S., 701."

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the State, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either like other taxes, upon property generally, or only upon the lands benefitted by the improvement, is authorized to determine both the amount of the whole tax and the class of lands which will receive the benefit and should therefore bear the burden, although it may, if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.

"When the determination of the lands to be benefitted is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefitted and how much. But the legislature has the power to determine, by the statute imposing the tax, what lands which might be benefitted by the improvement are in fact benefitted; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether
their lands are benefitted or not, but only upon the validity
134 of the assessment and its apportionment among the different
parcels of the class which the legislature has conclusively determined to be benefitted."

In Willis *vs.* Eggleston, 170 U. S., 304, it was said: "Nor can it be doubted that, if the State constitution does not prohibit (and our constitution does not), the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be considered as *beneficial* by a proposed improvement."

See also Parsons *vs.* District of Columbia, 170 U. S., 45; 2 Dillon's Municipal Corporations, section 752, p. 56. The ruling of that court upon the question now under consideration have been uniform and

in line with a rule well established by the Supreme Court of the United States, and never departed from until the Norwood case. We must therefore decline to recede from a doctrine so well established and which we think supported by reason and authority.

No notice was required to be given to defendant of the passage of the ordinance or the assessment before the issuing of the tax bill and none was necessary.

The judgment should be affirmed, and it is so ordered.

All concur.

G. D. BURGESS, *J.*

135 And afterwards, to wit, on the 13th day of June, 1900, the further following proceedings were had in said cause, viz:

AUGUST HEMAN, Resp.,
v.
JNO. L. SHUMATE ET AL., App.

Come now the said ap-ellants, by attorney, and file their motion for rehearing herein.

Which said motion for rehearing is in words and figures as follows, viz:

In the Supreme Court of Missouri, in Banc.

AUGUST HEMAN, Respondent,
vs. No. 9984.
JOHN L. SHUMATE and HUNTINGTON SMITH, Appellants.

And now comes the appellants and move the court to set aside the opinion, findings, and decree entered in the above-entitled cause, and to grant to appellants a rehearing herein, and for grounds of this motion allege the following:

I.

It was error to hold and rule that appellants could not raise in this court the point that the plaintiff's petition, upon which the cause was tried, did not state facts sufficient to constitute a cause of action.

It was error to hold and to rule that the appellants, to avail themselves of that point, must first raise it by demurrer to plaintiff's petition in the lower court.

Said ruling is in contravention of every previous decision of this court upon that subject, and said ruling should now, for that reason, be set aside and the point considered.

II.

136 It was error for the court to hold and to rule that the special-tax bill sued on was or could be *prima facie* evidence of facts which were necessary to plaintiff's recovery, and yet which plaintiff had not alleged in his petition. The special-tax bill, under the law, could be *prima facie* evidence only of material facts which had been alleged in plaintiff's petition.

III.

It was error in the court to hold and to rule that plaintiff's special-tax bill should have been received in evidence over appellants' objection to support plaintiff's petition, when the same did not state a cause of action.

IV.

Appellants' answer to plaintiff's petition in this cause contains the following specific averment and prayer:

"That the enforcement and collection of said alleged special-tax bill predicated upon said alleged assessment, by the sale of said property, claimed to be subject to the same under sections 21, 22, 24, and 25 of article VI of the charter of the city of St. Louis and the ordinances of the city of St. Louis numbered 13076, 13482, and 14625 and ordinances of said city numbered 13596 and 14630, which ordinances are set out in plaintiff's petition, would be, in fact, the confiscation of said property under the claim of exercising the right of taxation, and would be depriving defendants of their said property without due process of law, and would be taking the said property of defendant for public use without just compensation, contrary to the provisions of the 14th amendment of the Constitution of the United States and contrary to the provisions of section 20 and 21 of article II of the constitution of the State of Missouri; and for that reason said provisions of said charter and said ordinances and said assessment and said tax bill are void, and said provisions of said charter and of said ordinances of said city are repugnant to and in conflict with the said provisions of said consti-
137 tutions for the further reasons that they do not provide for limiting the amount of special taxes for the construction of said sewer to the amount of value or to the benefits received from said construction by defendants' property so taxed; and for the reason that they do not contain any provisions requiring the municipal assembly of said city or any other State or municipal agency to find and determine the extent to which the public of the city of St. Louis would be and were benefitted by the said alleged improvement, and contain no provision requiring the said municipal assembly or any other municipal or State agency to find and determine that the property embraced in the taxing district created by said ordinance or that defendants' said property would be benefitted by said alleged improvement, or to ascertain the extent to which defendants' property would be or was benefitted over and above the benefit derived from the same improvement by the public or by the city of St. Louis; and for the reason that the said provisions of the said charter and ordinance provides for the assessment of the cost of the construction of said sewer and sewers against the owners of the property in said alleged district by apportioning the whole cost of such construction and improvement on the front feet of said property without regard to the unequal depths and without regard to the fact that if the property was benefitted at all over and above the benefit derived by the public some of the said abutting property

would receive greater benefits from the said work than other property in the same district.

These defendants allege that the said special-tax bill No. 8689 is an apparent lien and constitutes a cloud upon defendants' title to defendants' land described in the said petition and in said tax bill.

Thereupon these defendants pray that this court will order, adjudge, and decree that the said assessment of the proportionate part of the cost of construction of the said sewer against the defendants' property, and that the said special-tax bill herein sued
138 on, being number 8689, are null and void and of no effect and constitute no lien upon defendants' said property, and that said special-tax bill be cancelled and delivered up to these defendants."

In support of the foregoing allegation, appellants, by their brief, directed the attention of this court to the following decided cases:

Asberry *vs.* City of Roanoke (1885), 91 Va., 562.
City of Detroit *vs.* Chapin (1897), 112 Mich., 588.
Weed *v.* City of Boston (1898), 42 L. R. A., 642.
Violett's Heirs *vs.* City Council, 23 S. E., 909.
Hammett *vs.* Philadelphia, 65 Pa. St., 146.
State Agents *v.* Newark, 37 N. J. L., 415.
Norwood *v.* Baker, 172 U. S., 269.
Hutcheson *vs.* Storrie (Tex., 1899), 51 S. W., 848.
Fay *v.* Springfield, 94 Fed. Repr., 409.
Charles *v.* City of Marion, 98 Fed. Repr., 166.
Lyon *v.* City of Tonawanda, 98 Fed. Repr., 361.
Cowley *v.* Spokane, 99 Fed., 840.
Walsh *vs.* Barron, 55 N. E., 164; 61 Ohio St., 15.
Dillon Mun. Cor., 4th ed., vol. 22, pp. 932–936.

It was error in this court to hold and rule that the said sections of the charter of the city of St. Louis and the said ordinances of the city of St. Louis and said special-tax bill were not null and void by reason of the fact that all of them were repugnant to and violative of the 5th and 14th amendments of the Constitution of the United States as well as repugnant to and violative of sections 20 and 21 of article II of the constitution of the State of Missouri. It was error in this court to refuse to follow the decision of the Supreme Court of the United States in the case of Norwood *vs.* Baker (172 U. S., 269), and to apply the constitutional principle there laid down and established to the said sections of the charter of the city of St. Louis, and to said ordinance of the said city of St. Louis, and to said special-tax bill.

139 It was error in this court to hold that said sections of said charter and said ordinances and said special-tax bill were valid, notwithstanding the fact that as against the said charter, ordinances, and special-tax bill the appellants by their answer specifically invoked the protection of the 5th and 14th amendment of the Constitution of the United States.

V.

Under the charter of the city of St. Louis city sewers are classified as "public sewers," "district sewers," and "private sewers." The property of appellants could not be taken in whole or in part to pay for the cost of the construction of a public sewer. The Vandeventer Avenue sewer was, as a matter of fact, a public sewer. The board of public improvements and the municipal assembly of the city of St. Louis nevertheless unlawfully declared the said Vandeventer Avenue sewer to be a "district sewer," and unlawfully taxed the cost of the construction of the same against the property of appellants and of others in the taxing district. The taking of appellants' property through and by the means of the said special-tax bill to pay for part of the construction of said public sewer was and is the taking of appellants' property without due process of law and in violation and contravention of the 5th and 14th amendments of the Constitution of the United States, the protection of which appellants pleaded and claimed in their answer filed in the court below.

For that reason this court should have held that all the said provisions of said charter and all of said ordinances upon which said special tax was predicated and the said special-tax bill itself were all null and void.

GROVER & GROVER,
Attorneys for Appellants.

And afterwards, to wit, on the 19th day of June, 1900, the further following proceedings were had in said cause, viz:

140

AUGUST HEMAN, Resp.,
v.
JNO. L. SHUMATE ET AL., App.

Now, at this day, the court, having fully considered and understood the motion heretofore filed for rehearing herein, doth order that said motion be, and the same is hereby, overruled.

And afterwards, to wit, on the 28th day of November, 1900, the further following proceedings were had in said cause, viz:

AUGUST HEMAN, Respondent,
vs.
JOHN SHUMATE, Appellant.

Now, at this day, there is presented to the Honorable James B. Gantt, chief justice of the supreme court of the State of Missouri, in chambers, a writ of error to the Supreme Court of the United States, a citation directed to said respondent, citing and admonishing him to appear at a Supreme Court of the United States on the 28th day of December, 1900, an assignment of errors, and a bond in the sum of one thousand dollars; which said writ of error is allowed, said citation signed, said assignment of errors filed, and said bond approved, ordered filed, and made a part of the record herein.

Which said assignment of errors is in words and figures as follows, to wit:

In the Supreme Court of the United States.

JOHN L. SHUMATE, Plaintiff in Error,
vs.
AUGUST HEMAN, Defendant in Error.

Assignment of Errors.

Now comes John L. Shumate, plaintiff in error, and says that in the record, actions, judgments, and judicial proceedings in the cause styled August Heman, plaintiff, against John L. Shumate, defendant, in the circuit court of the city of St. Louis, Missouri, as well as in the records, actions, judgments, judicial proceedings, and
141 opinions of the supreme court of Missouri, in the cause styled August Heman, respondent, against John L. Shumate, appellant, which was and is the same identical cause aforesaid, there is manifest error to the great prejudice and damage of said Shumate in this, to wit:

I.

That the said circuit court of the city of St. Louis erred:

First. In finding and holding that upon the law and evidence in this case the public of the city of St. Louis and the city of St. Louis itself *was* not benefitted by the construction of the said Vandeventer Avenue sewer, it appearing fully and exclusively from the evidence that the said sewer was projected and recommended by the board of public improvements as a sanitary measure necessary for the welfare of the whole people of the city of St. Louis, and that, in conformity with such recommendation of the board of public improvements, the municipal assembly, by the ordinances aforesaid, directed and authorized the construction of said sewer for the purpose for which it was recommended; it appearing further from evidence that 125 acres of the property of the city of St. Louis, or 125 acres of the public property of the city of St. Louis, *was* intended to be and *was* actually drained by the said Vandeventer Avenue sewer, through which all the drainage and sewage from the said 125 acres of public property was carried off and conveyed into the Mill Creek sewer, the latter being a public sewer of the city of St. Louis.

Second. In failing and refusing to find and hold, as prayed in the answer of plaintiff in error and urged in the motion for a new trial, that the provisions of sections 18, 21, 22, 24, and 25 of article VI of *article VI of* the charter of the city of St. Louis and the ordinances 13076, 13482, 14625, and ordinances numbered 13596 and 14630 and the contract with the defendant in error made thereunder and set out in plaintiff's petition and assessment against plaintiff in error or his property for the cost of the construction of said sewer were null, void, and of no effect, for the reason that they are repugnant to and in contravention of the 14th amend-
142 ment of the Constitution of the United States and contrary to the provisions of sections 20 and 21 of article II of the constitution of the State of Missouri.

Third. In not finding and decreeing, as prayed in the answer of plaintiff in error and urged in the motion for a new trial, that upon the facts and law in this case, as the general public of the city of St. Louis and the city of St. Louis derived benefit from the construction and use of said sewer, the city, and the city alone, was liable for the value of the benefit inuring to the city and to the public of the city by the construction and use of said sewer, and that the whole cost of the construction of said sewer should not have been assessed against the property and property-holders in said district, including plaintiff in error and his property.

Fourth. failing and refusing to find and decree, as prayed in the answer of plaintiff in error and urged in the motion for a new trial, that upon the facts and law in this case plaintiff in error and his property could not be made liable for any part of the cost of the construction of said sewer beyond the actual benefit, if any, resulting to his property from the construction of said sewer.

Fifth. In finding and holding, against the contention of plaintiff in error in his answer and in his motion for a new trial, that notwithstanding the failure of the aforesaid provisions of the charter of the city of St. Louis, to wit, sections 18, 21, 22, 24, and 25 of article VI and of the said ordinances of said city, to wit, ordinances No. 13076, 13482, 14625, 13596, and 14630, to provide and require that there should be an ascertainment and determination of the fact whether or not the city and the general public were benefitted by the construction of said sewer, said provisions of said charter and said ordinances were valid and not in contravention of the said provisions of the Constitution of the United States.

Sixth. In declining and refusing to declare and determine, as prayed in the answer of plaintiff in error and urged in his
143 motion for a new trial, that the provisions of said charter and of said ordinances mentioned in the proceeding paragraph and any assessment thereunder compelling the property-owners so assessed, including the plaintiff in error herein, to pay and bear the entire cost of constructing said sewer, when the evidence showed that the city of St. Louis and the general public were actually benefitted by the construction of said sewer, necessarily resulted in depriving the plaintiff in error herein of his property without due process of law and in taking his property for public use without just compensation and in depriving him of the equal protection of the laws, contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

Seventh. In finding and determining against the contention of plaintiff in error in his answer and motion for a new trial that plaintiff in error or his property could be made liable for any part of the cost of said sewer without a legal assessment being made therefor in the manner required by the charter of said city of St. Louis and in the absence of any evidence of the making of such an assessment, which said finding and judgment deprives the plaintiff in error of his property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

II.

That the supreme court of Missouri erred:

First. In not reversing the judgment of the circuit court of the city of St. Louis against the plaintiff in error in said cause because of the several errors of said circuit court in its actions, rulings, judgments, and judicial proceedings, the same being the errors hereinbefore specified and set out at length.

Second. In finding and determining, against the contentions of plaintiff in error made in said circuit court and repeated in said supreme court of Missouri, that he or his property could be made liable for any part of the cost of said sewer without a legal assessment being made therefor in the manner required by the charter of
144 said city of St. Louis and in the absence of any evidence that such assessment was made, by which said finding and judgment the property of plaintiff in error was, to the extent of said judgment, taken without due process of law, in contravention of the fourteenth amendment to the Constitution of the United States, the protection of which was duly invoked by plaintiff in error in said circuit court and said supreme court.

Third. In finding, holding, and determining, against the contention of plaintiffs in error, that the opinion and judgment of the Supreme Court of the United States in the similar case of Norwood v. Baker, 172 U. S., 269, were not binding and conclusive upon it, the said supreme court of Missouri, in contravention of the provisions of article VI (2nd paragraph) of the Constitution of the United States.

Fourth. In overruling a motion for the rehearing of said cause, duly and within the time required by law made and presented to said Supreme Court by plaintiff in error, which said motion was based upon the several errors in its actions, rulings, judgments, and judicial proceedings as above set forth, and in the actions, rulings, judgments, and judicial proceedings of the said circuit court of the city of St. Louis more specifically hereinbefore set forth; to which reference is now here made.

Wherefore, for these and divers other reasons and causes apparent on the face of said records, to wit, the record in the cause of August Heman, plaintiff, against John L. Shumate, in the said circuit court of the city of St. Louis, and the record in the same identical cause in the supreme court of Missouri, there styled and designated as August Heman, respondent, against John L. Shumate, appellant, the said John L. Shumate, plaintiff in error herein, now prays that the said actions, rulings, judgments, opinions, and judicial proceedings heretofore has, as aforesaid, in said cause in the circuit court of
the city of St. Louis and the supreme court of Missouri may
145 be reversed, set aside, and for naught held and esteemed, and that judgment here, in this court, the honorable Supreme Court of the United States, may be entered in favor of him, the said John L. Shumate.

HIRA- J. GROVER,
HAMILTON GROVER AND
GEORGE B. WEBSTER,
Attorneys for John L. Shumate, Plaintiff in Error.

Which said bond is in words and figures as follows, to wit:

Know all men by these presents that we, John L. Shumate, as principal, Hiram J. Grover and Huntington Smith, as sureties, are held and firmly bound unto August Heman in the full and just sum of one thousand dollars, to be paid to the said August Heman, his heirs, executors, and administrators; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22nd day of November, in the year of our Lord one thousand nine hundred.

Whereas lately, at the April term, A. D. 1900, of the supreme court of Missouri, in a suit depending in said court between August Heman, respondent, and John L. Shumate, appellant, judgment was rendered against the said appellant, and the said appellant having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said August Heman, citing and admonishing him to be and appear at a Supreme Court of the United States, to be held at Washington, D. C., not exceeding thirty days from and after the date of the citation in said cause:

Now, the condition of the above obligation is such that if the said John L. Shumate shall prosecute said writ to effect and answer all costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

JOHN L. SHUMATE. [SEAL.]
146 HIRAM J. GROVER. [SEAL.]
HUNTINGTON SMITH. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Not to act as supersedeas of judgment for the debt proper.

Approved by—

JAS. B. GANTT,
Chief Justice Supreme Court of Missouri.

STATE OF MISSOURI, *set:*

I, Jno. R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the case of August Heman *vs.* John L. Shumate as fully and complete as the same appear of record and on file in my said office.

Seal of the Supreme Court of Missouri.

In witness whereof I have hereunto set my hand as clerk and affixed the seal of said court. Done at office, in the city of Jefferson, this 4th day of December, A. D. 1900.

JNO. R. GREEN, *Clerk.*

Endorsed on cover: File No., 18,035. Missouri supreme court. Term No., 550. John L. Shumate, plaintiff in error, *vs.* August Heman. Filed January 28, 1901.

No. 550.

Motion to Advance.

Office Supreme Court U. S.
FILED
JAN 28 1901
JAMES H. MCKENNEY,
Clerk.

Filed Jan. 28, 1901.

IN THE Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 550

JOHN L. SHUMATE, PLAINTIFF IN ERROR,

vs.

AUGUST HEMAN, DEFENDANT IN ERROR.

MOTION TO ADVANCE CAUSE.

The plaintiff in error respectfully shows that this cause involves the question whether or not the provisions of the charter of the city of St. Louis requiring the whole cost of sewers to be assessed *pro rata* against the lots of ground in the district according to proportion which the area of the lot bears to the area of the entire district is repugnant to the fourteenth amendment to the Constitution of the United States.

That a large amount of public work, especially the construction of sewers, in the said city of St. Louis is suspended pending the determination of said cause, because of the uncertainty whether the decision of this court in Village of Norwood *vs.* Baker, 172 U. S., 269, is applicable to the said

provisions of said charter, and that it is highly desirable that such public work proceed with all possible speed, to the end that the same may be completed by the time set for the proposed centennial celebration of the Louisiana Purchase, to be held in the said city of St. Louis.

That there is already pending in this court another cause involving similar issues, to wit, the case of French *et al.*, plaintiffs in error, *vs.* Barber Asphalt Paving Company *et al.*, defendants in error, which has been advanced and set for hearing on February 25, 1901, but that a decision in that case, which involves the constitutionality of the charter of the city of Kansas City, will not be decisive of this cause, owing to the difference between the provisions of the charters of the two cities.

Wherefore the plaintiff in error prays that this cause be advanced and ordered set for hearing upon the same day, to wit, the 25th day of February, 1901, or upon such other day as the court may order.

HIRAM J. GROVER,
G. B. WEBSTER,
Attorneys for Plaintiff in Error.

The defendant in error joins in the foregoing motion.

DAVID GOLDSMITH,
ROB'T E. COLLINS,
Attorneys for Defendant in Error.

[Endorsed:] No. —. Div. —. In the Supreme Court of the United States. John L. Shumate, plaintiff, *vs.* August Heman, defendant. Motion to advance cause. G. B. Webster, attorney and counselor at law, Carleton building, St. Louis.

550.

FILED
FEB 26 1901
JAMES H. McKENNEY
Clerk.

Brf. of Webster for P.G.

IN THE

Supreme Court of the United States.

Filed Feb. 26, 1901.

OCTOBER TERM, 1900.

No. 550.

JOHN L. SHUMATE,
Plaintiff in Error,

vs.

AUGUST HEMAN,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

HIRAM J. GROVER,
HAMILTON GROVER,
G. B. WEBSTER,
Counsel for Plaintiff in Error.

Real Estate Ptg. & Pub. Co., 9 N. 8th St. Phones: Kinloch, B 1429; Bell, Main 2523 A.

STATEMENT.

This action was begun by the defendant in error in the Circuit Court of the City of St. Louis, Missouri, to enforce the lien of a special tax bill issued for the construction of a sewer in what is known as Vandeventer Sewer District No. 1 of that city.

The amount of the bill represented the proportionate part of the entire cost chargeable under the provisions of the charter of the city against a lot owned by plaintiff in error, which lies within the boundaries of that district.

A trial of the case resulted in a judgment establishing the lien, and in due course of procedure the case found its way to the Supreme Court of Missouri, where the judgment was affirmed, the report of the decision appearing in 156 Mo. at page 534. After an unavailing motion for a re-hearing, the case was brought here by a writ of error.

PETITION—(*Trans. pp.* 5-6).

The petition was in the usual form in Missouri for such actions, except in the following particulars:

(1) While the Charter specifically provides that the assessment of the cost of the construction of sewers shall be made by the Board of Public Improvements, as a Board, there is no allegation in the petition that the Board of Public Improvements, as a Board, made any assessment.

(2) While the petition alleges that there were ordinances directing a taxing or sewer district, and ordinances directing contracts to be made for the construction of sewers in the district, and the petition further states that "such ordinances were as follows, to-wit:" as a matter of fact, the ordinances were not inserted in, nor attached to, the petition as exhibits. The ordinances, however, were offered in evidence by plaintiff in error, and are found in the transcript pages 39 to 62.

THE ANSWER—(*Trans. pp.* 8-10).

The amended answer, on which the case went to trial, con-

tained a general denial and a cross-bill praying the cancellation of the tax bill. It was further averred that the enforcement and collection of said tax bill would constitute confiscation and deprive the plaintiff in error of his property without due process of law and take his property for public use without just compensation, contrary to the provisions of the fourteenth amendment to the constitution of the United States, because no valid assessment was made in the manner and form required by the City Charter and by the terms of the ordinances; that the provisions of the Charter of the City of St. Louis relating to the assessment of special taxes for construction of district sewers, and also the ordinances for the construction of the sewer involved in this case, were repugnant to and in conflict with the fourteenth amendment because they failed to provide for limiting the amount so assessed to the amount of value, or to the amount of benefit derived by the property of plaintiff in error from the improvement for which the tax was leived, and because no provision of the Charter or of the ordinances required the Municipal Assembly, or any other State or municipal agency, to find and determine that the property embraced in the taxing district, or the property of plaintiff in error, would be benefitted by the construction of the sewer, or to ascertain the amount of such benefit, if any, or the amount of such benefit over and above the benefit derived by the public generally, of the City of St. Louis, from the same improvement, and for the further reason that the City Charter and the said ordinances provide for the assessment of the cost of said sewer against the property in the taxing district by apportioning the whole cost of such construction and improvement between the lots according to their respective areas, without regard to the fact that, if the same were benefitted at all, the public in general and some of the abutting property would receive equal or greater benefits from the same improvement. It was alleged that the tax bill, though void for the foregoing reasons, was nevertheless a cloud on the title of plaintiff in error which ought to be removed, and cancellation of the bill was prayed.

THE REPLY—(*Trans.*, *p.* 11 .)

Defendant in error, by his reply, denied all the allegations of new matter contained in the foregoing answer.

THE EVIDENCE.

Defendant in error (plaintiff below) offered the following evidence at the trial:

1. **The tax bill sued on in this case.** (*Trans.*, *p.* 7 .)

It is regular on its face, and, as will be noticed, contains a certificate that the assessment was made by the Board of Public Improvements.

2. **Testimony of August Heman, defendant in error.** (*Trans.*, *p.* 13 .)

He identified the signatures of the city officials appearing upon the face of the tax bill, but all the remainder of his testimony was upon a branch of the case which is not before this court.

On behalf of plaintiff in error (defendant below) the following evidence was introduced:

1. **Testimony of Emory S. Foster, secretary Board of Public Improvements.** (*Trans.*, *p.* 30 .)

He identified all the portions of the record of the board relating to the construction of the sewer, and his testimony showed affirmatively that the assessment of the tax was made by the president of the Board of Public Improvements, and the several bills made out by him, although both were approved by the board when subsequently presented to it. The trial court, on the objection of defendant in error, refused to allow this witness to answer the question whether or not the record kept by him showed any action of the board determining whether or not the public was benefited by the construction. Exceptions to this ruling were duly saved, and urged upon the State Supreme Court on appeal.

Among the entries on the record of the Board of Public Improvements, identified and read by this witness, was one showing that the construction of the sewer in question was

determined upon and recommended by the board as a "sanitary measure." (*Trans.*, *p.* 31 .)

2. **Ordinance No. 13,076 of the City of St. Louis,** creating the sewer district. (*Trans.*, *p.* 37 .)

3. **Ordinance No. 13,482 of said city,** amending the foregoing ordinance by changing the limits of the district. (*Trans.*, *p.* 41 .)

4. **Ordinance No. 14,625 of said city,** amending both of the above ordinances by further changes in the limits of the district. (*Trans.*, *p.* 42 .)

5. **Ordinance No. 13,596 of said city,** providing for the construction of sewers in said district, being the same for which the tax bill in question in this case was issued.

The last section of the ordinance is as follows:

"SEC. 26. As soon as said district sewers with their inlets, manholes and other appurtenances are fully completed, the Board of Public Improvements shall cause to be computed the whole cost thereof and shall assess it as a special tax against all the lots of ground in said district respectively, without regard to improvements and in proportion as their respective areas bear to the area of the whole district, exclusive of public highways; and the board shall cause to be made out a certified bill of such assessment against each lot in the district in the name of the owner thereof. And said special tax-bills shall be made out by the president of said board and by him registered in his office in full and certified and delivered to the comptroller, and his receipt taken therefor and by him registered and countersigned and delivered to the party in whose favor they are issued for collection and his receipt taken in full of all claims against the city on account of said work." (*Trans.*, *p.* 56.)

6. **Ordinance No. 14,630 of said city,** amending the last mentioned ordinance by changing the route of the sewers in certain localities. The section above quoted (26) was not altered or amended in any way. (*Trans.*, *p.* 57 .)

Testimony of William Wise, Assistant Sewer Commissioner of St. Louis, relating principally to the character of the sewer and topography of the district. (*Trans.*, *pp.* 62-72.)

7. **Testimony of Robert E. McMath, President of the Board of Public Improvements, and former Sewer Commissioner of St. Louis.** (*Trans.*, *p.* 72 .)

This witness was asked whether any determination of the question of benefit to the public from the construction of the sewer in question was had, but on objection of the defendant in error the evidence was excluded. Plaintiff in error duly excepted and urged his exceptions upon the State Supreme Court on appeal. (*Trans.*, *p.* 72 .)

When asked by defendant in error to state whether the property in the district taxed was benefitted by the construction of the sewer, counsel for plaintiff in error objected to the form of the question because it merely called for a conclusion. The trial court said, "What has that question to do with the case, anyhow? I sustain the objection." (*Trans.*, *p.* 73 .)

MR. MCMATH testified that twenty-five acres not included in the taxing district were wholly drained into this sewer, although the owners thereof were not, and under the city charter could not have been taxed for any part of the cost of the sewer, and that public property to the extent of one hundred and twenty-five (125) acres, streets, and alleys within the taxing district, were also drained into the sewer, although none of the cost of construction was paid from the public funds, the entire amount thereof being assessed against the private property in the district. (*Trans.*, *p.* 73-74)

This was all the evidence in the case.

THE PROVISIONS OF THE ST. LOUIS CHARTER.

The portions of the St. Louis charter relating to special tax bills for the cost of district sewers are as follows:

"SEC. 22. Board to approve district sewer improvements—authority of assembly in reference to same—special taxes for district sewers—repairs to be paid by city. District sewers shall be established within the limits of districts, to be prescribed by ordinance as approved by the board of public improvements, and so as to connect with a public sewer, or some natural course of drainage. Such district may be subdivided, enlarged or changed, upon the recommendation of said board, by ordinance, at any time previous to the construction of the

sewer therein. The assembly shall cause sewers to be constructed in any district whenever a majority of the property holders resident therein shall petition therefor, or whenever the board of public improvements shall recommend it as necessary for sanitary or other purposes; and the character, dimension and material of such sewer shall be prescribed and may be changed, diminished, enlarged or extended, and such sewer shall possess all requisite laterals, inlets and other appurtenances. As soon as a district sewer, with its inlets, manholes and other appurtenances is fully completed, the said board shall cause to be computed the whole cost thereof, and shall assess it as a special tax against all the lots of ground in this district respectively, without regard to improvements, and in proportion as their respective areas bear to the area of the whole district, exclusive of the public highway; and the board shall cause to be made out a certified bill of such assessment against each lot in the district, in the name of the owner thereof, which shall be collected and paid in the manner hereinafter prescribed: Provided, that the repairs and other incidental expenses of district sewers shall be paid out of the general revenue."

"SEC. 24. Special tax bills—how made out.—All special tax bills for work contemplated by this Charter shall be made out by the president of said board, and by him registered in his office in full, and certified and delivered to the comptroller, and his receipt taken therefor, and by him registered and countersigned and delivered to the party in whose favor it is issued for collection, and his receipt taken in full of all claims against the city on account of said work."

"SEC. 25. Special tax bills to be a lien on property—manner of collecting same—city not to be liable for special tax bills, etc.— Said tax bill shall be and become a lien on the property charged therewith, and may be collected of the owner of the land, in the name of and by the contractor, as any other claim in any court of competent jurisdiction, with interest at the rate of ten per cent per annum, after thirty days from demand of its payment date; and if not paid within six months after such demand, then at the rate of fifteen per cent per annum from the date of said demand. In case the owner of the ground is a non-resident of the state, suit may be brought by attachment, which shall be a demand of its payment. Such certified bill shall in all cases be *prima facie* evidence that the work and material charged in such bill shall have been furnished and of the execution of the work, and of the correctness of the rates or prices, amount thereof, and of the ability of the

person therein named as the owner of the land charged with such bill to pay the same. Provided, that nothing in this section shall be so construed as to prevent the party charged with the payment of said bill from pleading, in reduction of the amount of same, that the work therein mentioned was not done in a good and workmanlike manner; and provided, that if the party charged shall set up, by way of defense, that the work was not done in a workmanlike manner, according to the class of work mentioned in the contract, and that such party before the commencement of the suit, tendered to the contractor the full value of such work as done, and shall establish the same on the trial, the recovery shall only be for the amount so tendered, and judgment for costs shall be rendered against the plaintiff. The city shall not be liable, in any manner whatever, for on account of any work done which is to be paid for in the manner provided in this section."

The Board of Public Improvements is required by Section 22 to do three acts, two of which it may delegate, but the third of which it must itself perform, thus:

(1) The said board shall cause to be computed the whole cost thereof. It is to be observed that this computation may be done by someone else, but, after being done, it must necessarily be approved by the board.

(2) The board shall assess it (the cost) as a special tax against all the lots of ground in the district. It is to be noted that the board is not allowed to "cause" the assessment to be made, but must make the assessment itself.

(3) The board shall cause to be made out a certified bill of such assessment against each lot in the district. It is to be observed that here, too the board may "cause" the certified bills to be made out, and it is not required to make out the bills itself.

The record of the board as read at the trial by Foster, the secretary, shows no action of the board causing the computation to be made, nor does it show that the board, as a body, ever performed the specific act of making the apportionment, or assessment of the tax against the lots of ground in the district. It does not even show that the board caused a certified bill of assessment against the property of plaintiff in error, or anyone else, to be made out.

The only record of any act of the board in connection with the apportionment of the cost of construction of this sewer is as follows:

"The president submitted special tax bills for the construction of sewers in Vandeventer Avenue Sewer District on August Heman, under contract No. 1,454, and 14,630, approved by the following votes: Ayes—Commissioners Homan, McMath, ———, Murphy and President Flad, 6. Noes—none." (*Trans.*, *p.* 38.)

It is contended by plaintiff in error that the burden was upon defendant in error to show a legal assessment, and that, having failed to do so, and it conclusively appearing from the evidence that no valid assessment ever was made, the judgment establishing the lien of the special tax bill against his lot was a taking of his property, to that extent, without due process of law, in contravention of the fourteenth amendment to the Constitution of the United States.

It is also contended that the ordinances under which this sewer was constructed, as well as the provisions of the city charter under which these ordinances were enacted, are unconstitutional and void, because in conflict with the fourteenth amendment, in that, by their terms, a betterment tax is imposed without regard to the question of corresponding benefits, and without notice of hearing thereon and opportunity to contest the existence of benefits to the property taxed, or the fairness of apportionment between the several lots of ground embraced in the taxing district.

These are the two questions involved in this case and now presented for determination.

ASSIGNMENT OF ERRORS.

Now comes John L. Shumate, plaintiff in error, and says that in the record, actions, judgments and judicial proceedings in the cause styled August Heman, plaintiff, against John L. Shumate, defendant, in the Circuit Court of the City of St. Louis, Missouri, as well as in the records, actions, judgments, judicial proceedings and opinions of the Supreme Court of Missouri, in the case styled August Heman, respondent, against John L. Shumate, appellant, which was and is the same identical cause aforesaid, there is manifest error, to the great prejudice and damage of said Shumate in this, to-wit:

I.

That the said Circuit Court of the City of St. Louis erred:

First. In finding and holding that upon the law and evidence in this case, the public of the City of St. Louis, and the City of St. Louis itself, was not benefitted by the construction of the said Vandeventer avenue sewer; it appearing fully and exclusively from the evidence that the said sewer was projected and recommended by the Board of Public Improvements, as a sanitary measure, necessary for the welfare of the whole people of the City of St. Louis, and that, in conformity with such recommendation of the Board of Public Improvements, the Municipal Assembly, by the ordinance aforesaid, directed and authorized the construction of said sewer for the purpose for which it was recommended; it appearing further from evidence that 125 acres of the property of the City of St. Louis, or 125 acres of the public property of the City of St. Louis, was intended to be and was actually drained by the said Vandeventer avenue sewer, through which all the drainage and sewage from the said 125 acres of public property was carried off and conveyed into the Mill Creek sewer, the latter being a public sewer of the City of St. Louis.

Second. In failing and refusing to find and hold, as prayed in the answer of plaintiff in error and urged in the motion for a new trial, that the provisions of Sections 18, 21, 22, 24 and

25 of Article VI. of the Charter of the City of St. Louis, and the Ordinances 13,076, 13,482, 14,625, and Ordinances number 13,596 and 14,630, and the contract with the defendant in error made thereunder and set out in plaintiff's petition, and assessment against plaintiff in error or his property for the cost of the construction of said sewer, were null, void and of no effect, for the reason that they are repugnant to and in contravention of the fourteenth amendment of the Constitution of the United States, and contrary to the provisions of Sections 20 and 21 of Article 11 of the Constitution of the State of Missouri.

Third. In not finding and decreeing, as prayed in the answer of plaintiff in error and urged in the motion for a new trial, that upon the facts and law in this case, as the general public of the City of St. Louis, and the City of St. Louis derived benefit from the construction and use of said sewer, the city, and the city alone, was liable for the value of the benefit inuring to the city and to the public of the city, by the construction and use of said sewer, should not have been assessed against the property and property holders in said district, including plaintiff in error and his property.

Fourth. In failing and refusing to find and decree, as prayed in the answer of plaintiff in error and urged in the motion for a new trial, that, upon the facts and law in this case, plaintiff in error and his property could not be made liable for any part of the cost of the construction of said sewer, beyond the actual benefit, if any, resulting to his property from the construction of said sewer.

Fifth. In finding and holding, against the contention of plaintiff in error in his answer and in his motion for a new trial, that, notwithstanding the failure of the aforesaid provisions of the Charter of the City of St. Louis, to-wit, Sections 18, 21, 22, 24 and 25 of Article VI., and of the said ordinances of said city, to-wit, Ordinances Nos. 13,076, 13,482, 14,625, 13,596 and 14,630, to provide and require that there should be an ascertainment and determination of the fact whether or not the city and the general public were benefited by the construction of said sewer, said provisions of said charter were valid

and not in contravention of the said provisions of the Constitution of the United States.

Sixth. In declining and refusing to declare and determine, as prayed in the answer of plaintiff in error and urged in his motion for a new trial, that the provisions of said charter and of said ordinances mentioned in the preceding paragraph, and any assessment thereunder, compelling the property owners so assessed, including the plaintiff in error herein, to pay and bear the entire cost of constructing said sewer, when the evidence showed that the City of St. Louis and the general public were actually benefited by the construction of said sewer, necessarily resulted in depriving the plaintiff in error herein of his property without due process of law, and in taking his property for public use without just compensation, and in depriving him of the equal protection of the laws, contrary to the provisions of the fourteenth amendment to the Constitution of the United States.

Seventh. In finding and determining, against the contention of plaintiff in error in his answer and motion for a new trial, that plaintiff in error, or his property, could be made liable for any part of the cost of said sewer, without a legal assessment being made therefor in the manner required by tne Charter of said City of St. Louis, and in the absence of any evidence of the making of such an assessment, which said finding and judgment deprives the plaintiff in error of his property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

II.

That the Supreme Court of Missouri erred:

First. In not reversing the judgment of the Circuit Court of the City of St. Louis against the plaintiff in error in said cause, because of the several errors of said Circuit Court in its actions, rulings, judgments and judicial proceedings, the same being the errors hereinbefore specified and set out at length.

Second. In finding and determining, against the contentions of plaintiff in error, made in said Circuit Court and repeated in said Supreme Court of Missouri, that he or his property could be made

liable for any part of the cost of said sewer without a legal assessment being made therefor in the manner required by the Charter of said City of St. Louis, and in the absence of any evidence that such assessment was made, by which said finding and judgment the property of plaintiff in error was, to the extent of said judgment, taken without due process of law, in contravention of the fourteenth amendment of the Constitution of the United States, the protection of which was duly invoked by plaintiff in error in said Supreme Court.

Third. In finding, holding and determining, against the contention of plaintiffs in error, that the opinion and judgment of the Supreme Court of the United States in the similar case of Norwood vs. Baker, 172 U. S. 269, were not binding and conclusive upon it, the said Supreme Court of Missouri, in contravention of the provisions of Article VI (2d paragraph) of the Constitution of the United States.

Fourth. In overruling a motion for the rehearing of said cause duly, and within the time required by law, made and presented to said Supreme Court by plaintiff in error, which said motion was based upon the several errors in its actions, rulings, judgments and judicial proceedings, as above set forth, and in the actions, rulings, judgments and judicial proceedings of the said Circuit Court of the City of St. Louis, more specifically hereinbefore set forth, to which reference is now here made.

WHEREFORE, for these and divers other reasons and causes, apparent on the face of said records, to-wit: the record in the cause of August Heman, plaintiff, against John L. Shumate, in the said Circuit Court of the City of St. Louis, and the record in the same identical cause in the Supreme Court of Missouri, there styled and designated as August Heman, respondent, against John L. Shumate, appellant, the said John L. Shumate, plaintiff in error herein, now prays that the said actions, rulings, judgments, opinions and judicial proceedings heretofore, had, as aforesaid, in said cause in the Circuit Court of the City of St. Louis, and the Supreme Court of Missouri, may be reversed, set aside and for naught held and esteemed, and that judgment here in this court, the Honorable Supreme Court of the United States, may be entered in favor of him, the said John L. Shumate.

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BRIEF.

I.

The judgment establishing the lien of the tax bill against the property of plaintiff in error constitutes a taking of his property without due process of law.

(*a*) There can be no valid tax without a valid assessment.

St. L. & S. F. Ry. Co. v. Apperson, 97 *Mo.* 306, *l. c.*
State ex rel. v. Wabash R. Co., 114 *Mo.* 1.
Worthington v. Whitman, 67 *Iowa*, 190.
San Luis Obispo v. Pettit, 87 *Cal.* 499.
Graves v. Bruen, 11 *Ill.* 431.
Cooley, Taxation (2*d Ed.*), 352.

The assessment must be made in the manner provided by the statute which authorized the taxation, and a departure in any material part is fatal.

Blackwell, Tax Titles (2*d Ed.*), 255.
Dillon, Mun. Corp. (4*th Ed.*), *Sec.* 769.
Lyon v. Alley, 130 *U. S.* 177.
Marx v. Hanthorn, 148 *U. S.* 172.
Campbell Co. v. Taylor, 8 *Bush.* 206.
Westfall v. Preston, 49 *N. Y.* 353.
St. L. & S. F. Ry. Co. v. Apperson, 97 *Mo.* 306, *l. c.*

This is especially true of special assessments for local improvements.

2 *Desty, Taxation, p.* 1331.
Cooley, Taxation (2*d Ed.*), *p.* 659.
Cameron's Case, 50 *N. Y.* 502.
Sharp v. Speir, 4 *Hill*, 76.
Warren v. Grand Haven, 30 *Mich.* 24.
Henderson v. Casey, 3 *Bush.* 698.
St. Louis v. Rankin, 96 *Mo.* 497.

Where a board is required to make the assessment, that duty can not be performed by an individual member or an employee.

Metcalfe v. Messenger, 46 *Barb.* 325.

Middletown v. Berlin, 18 Conn. 197, l. c.
People v. Hager, 49 Cal. 229.
Oteri v. Parker, 42 La. Ann. 374.
Belfast Bank v. Kennebec Land Co., 73 Me. 404.

(*b*) These liens are creations of law and to establish them every step prescribed by law must be taken. Proceedings for the enforcement of such liens are *in invitum* and must be strictly construed.

Leach v. Cargill, 60 Mo. 316.
Kiley v. Oppenheimer, 55 Mo. 374.
Church v. People, 179 Ill. 205.
Stockton v. Whitmore, 50 Cal. 554.

(*c*) The petition filed in this case failed to allege any valid assessment, and the defendant in error failed to prove any at the trial. In truth no such assessment was even made, as the testimony of Foster at the trial (*Trans. p.* 38) and the records produced and identified by him (*Trans., p.* 38) clearly show.

In these circumstances the judgment was confiscatory in its nature and violative of the rights of plaintiff in error under the fourteenth amendment.

(*d*) The tax bill itself contains no evidence that an assessment had been made. The tax bill is not in itself an assessment. The charter, as we have seen, requires three specific acts to be performed. (1) The cost must be computed, and that the board may cause to be done. (2) The cost, when computed, must then be assessed against the property by the judicial act of the board itself. The board can not cause that to be done. (3) After the assessment has been made by the board of the entire cost against all the property in the taxing district, the board may then "cause" special tax bills to be made out. Neither the computation of the cost, not the making out of the tax bills can constitute the assessment. The putting in evidence of the fact that the cost was computed, and that the special tax bills were made out by the president of the board, afford no evidence whatever that an assessment was made by the board. The offering in evidence of the tax bills can not supplement the defect. The tax itself does not prove that an assessment was made.

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(*e*) Sec. 25, Art. VI, of the St. Louis Charter does not dispense with proof of the necessary allegation of the petition; but only provides that the special tax bill shall be *prima facie* proof of the allegations necessary to constitute a cause of action in a petition for the enforcement of the lien of a special tax bill.

The special tax bill can not be *prima facie* evidence of a necessary fact, which has not been alleged in the petition. It is only *prima facie* evidence of necessary facts which are pleaded.

II.

The provisions of the Charter of the City of St. Louis (Sec. 22, Art. VI.), and those of the city ordinances under which this special tax was levied, are in conflict with the provisions of the fourteenth amendment to the Constitution of the United States, and are therefore null and void.

1. They exclude from the assessment any consideration of corresponding benefits.

2. They provide no notice or opportunity to appear and contest the existence of alleged benefits, or the fairness of the apportionment of such benefits, if any exist.

3. They fix the proportion of the tax to be borne by each lot solely by a mathematical calculation, so that the assessment depends on the size of the lot alone, and not upon the benefit derived from the improvement.

Any assessment of special taxes under a law which does not afford the property owner an opportunity to be heard on the question of benefits and the fairness of the apportionment of the tax, and does not empower the municipal authorities to consider this question in fixing the assessment is a nullity, and any law which excludes from the assessment of such taxes the question of corresponding benefits is unconstitutional and void.

Dillon, Mun. Corp. (4th. Ed.), Vol. 2, pp. 932, 936.
Asberry v. City of Roanoke, 91 Va. 562.
City of Detroit v. Chapin, 112 Mich. 588.

Weed v. City of Boston, 42 L. R. A. 642.
Violett's Heirs v. City Council, 23 S. E. 909; 92. Va. 561.
Hammett v. Philadelphia, 65 Pa. St. 146.
State v. Newark, 37 N. J. L. 415.
Norwood v. Baker, 172 U. S. 269.
Hutcheson v. Storrie, 51 S. W. 848; 92 Texas, 685.
Fay v. Springfield, 94 Fed. 409.
Charles v. City of Marion, 98 Fed. 166.
Cowley v. Spokane, 99 Fed. 840.
Lyon v. City of Tonawanda, 98 Fed. 361.
Walsh v. Barron, 55 N. E. 164; 61 Ohio St. 15.
Parker v. Detroit, 103 Fed. 357.
Bidwell v. Huff, 103 Fed. 362.
Adams v. Shelbyville, 154 Ind. 467.

III.

The decision and opinion of this court in Village of Norwood v. Baker, 172 U. S. 269, was binding upon the Supreme Court of Missouri, and it was error on the part of the court to decline to follow it.

U. S. Const., Art. VI., Par. 2.
Black v. Lusk, 69 Ill. 70.
Bank v. Morgan, 28 Pa. St. 452.
Cabanne v. Lindell, 12 Mo. 189.

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ARGUMENT.

The Charter of the City of St. Louis prescribes the manner in which special taxes for the cost of the public improvements shall be assessed. By the terms of Section 22 of Article VI. of that instrument, the Board of Public Improvements is required to make an assessment for the cost of construction of district sewers such as that involved in this case. The section has already been set out in full in the statement (ante. p. 5.), and an examination of it shows that the board may **cause** the cost of such work to be computed and may **cause** the tax bills to be made out, but **must make** the assessment; the ministerial acts may be delegated, but the *quasi* judicial act must be performed by the **board as an organization.** The petition filed by the defendant in error in the State Circuit Court did not allege any assessment by the board, but contained the averment that "the president of the Board of Public Improvements computed the cost thereof and levied and assessed the same as a special tax against each lot of ground chargeable therewith." This does not meet the requirement of the city charter and the petition therefore failed to state one of the facts necessary to be proved to establish a lien.

Proceeedings for the enforcement of liens upon local assessments are in derogation of common right and those who prosecute them are held to a greater strictness of both pleading and proof than any other class of litigants. The validity of the lien depends upon the substantial compliance with every step required by law.

2 Desty Taxation, p. 1331.
Stockton v. Whitemore, 50 Cal. 554.
Leach v. Cargill, 60 Mo. 316.
Warren v. Grand Haven, 30 Mich. 24.

Such is the rule in all the states.

Unless it is alleged and proved that every step required by law has been taken, the lien can not attach.

In this case the right to judgment is predicated upon the

proper performance of each and every act designated by the charter of the city. One of those acts is the assessment of the tax by the Board of Public Improvements. Yet, nowhere in the petition do we see any averment of such action by that body. Indeed, the contrary appears, for it is stated that the act was performed by the president of the board, and the statement excluded possibility of presumption that it was the deed of the entire body acting as an organization. The case is no different from that of the president of a business corporation assuming to perform the functions of the board of directors and thus give to his individual acts the validity which the law says shall come only from the approval of the whole body. It will not do to say that the board as a body afterwards ratified the act, for ratification can bind none but those who ratify, and their rights are not in question here. Moreover, mere acquiescence can never suffice where the law requires positive action. To so hold would be to announce a doctrine so broad as to be dangerous and likely to bring about a degree of laxity in public affairs exceedingly detrimental to the public welfare.

Defendant in error could prove no more than he alleged and hence his petition, omitting as it did a fact essential to his recovery of judgment, was insufficient in law.

Not only was there lack of an allegation in the petition that the Board of Public Improvements made the assessment, but the evidence failed to show any such state of facts. Indeed, it appeared conclusively that the assessment was made as the petition stated, by the president of the board. According to the record of the board (Trans., p. 38), "the president submitted special tax bills for the construction of sewers in Vandeventer avenue sewer district," etc. If he submitted them, they were certainly made out, and if they were made out the act of assessment had been performed and nothing more remained. The subsequent approving vote of the board neither added to nor took from them. They were complete without that and so was each particular one. Both the levy and the apportionment were complete.

The City Charter constitutes this Board a Board of Assessors for special taxes. It gives them a power judicial in its character and to be used exclusively for public purposes, and

that such a power when conferred upon a body or two or more persons can be exercised only by a majority of the body acting together, is well settled law. One member alone can not do it; even though he be president of the body.

The rule is well stated by the Supreme Court of Connecticut in Middleton vs. Berlin, 18 Conn. 197 *l. c.* where it was said: "This pretened assessment list was in no sense the act of the board appointed by the inhabitants of Middleton to value and equalize their property.

"That board consisted of five persons, but this paper is the partial and unauthorized act of one man only.

"The rule governing the execution of private and public powers has long been settled. A power conferred upon two or more persons, by individuals, for private purposes, must be exercised by all, unless it be provided by the act conferring the power that a less number may effectuatly execute it; but an authority imposed by law, for public purposes, and especially for purposes of judicial character, may be exercised by a majority, if all have been legally notified to act.

"It is believed that no case can be found which will justify the performance of an aggregate duty by one only, as has been attempted here."

Accordingly, in that case, the assessment made by one member of a board of five was held illegal and void.

In Metcalfe vs. Messenger, 46 Barb. 325, the same question was discussed. There it was claimed by the defendant that the assessment sued upon was made by one member of the board alone, instead of by the whole board or a majority, and the court after a finding that such was the fact, said:

"One assessor can not make any assessment. It is the act of all or a majority of the assessors. There seems to be no answer to this objection, and that the assessment was irregular and void."

The law under which the assessment involved in that case was made put the power of assessment in a board composed of several members, but nevertheless a single member performed the act of assessing just as it was done in the case at bar.

It has already been seen that the petition of defendant in

error alleged the assessment in this case to have been made by the president of the Board of Public Improvements, instead of by the board itself as required by the charter, and that the allegation was fully sustained by the evidence on the other side of the case. In such circumstances nothing remains but to apply the settled law to the undisputed facts. Doing so leads to the necessary conclusion that there was no valid assessment of the special tax here in issue.

The Supreme Court of Missouri has, with the appellate courts of most of the states, decided that the assessment is the basis of taxation, and that there can be no tax without a valid assessment. It was so held in St. L. & S. F. Ry Co. v. Apperson, 97 Mo. 306, and in State v. Wabash Ry. Co., 114 Mo. 1; and Judge Cooley, in his work on Taxation (2d Ed., 352), reaches the same conclusion after citation of numerous cases. If these authorities correctly state the law, it necessarily follows that there was never any valid assessment of the tax in dispute here. The allegations of the petition admit and the evidence conclusively shows it.

However, it may be urged that the failure of the assessment raises no question of which this court can take cognizance. In answer to that, it is proper to say that this case does not fall within the class of cases where it is held that the method of assessment and collection of taxes is a matter for the determination of the states themselves, and that therefore the legality of the method adopted will not be reviewed by this court.

Here the objection is that the method adopted by the state authorities was not followed, and that a judgment was rendered and lien established without that which the state has designated as due process of law. It is such cases precisely that the fourteenth amendment was intended to cover, and the plaintiff in error, having claimed the protection of that provision, on the particular point, in the trial court, the question raised is properly within the jurisdiction of this court to determine.

Speaking on this point, Mr. Guthrie, in his valuable and interesting work on the Fourteenth Amendment (page 104) says: "The conclusion at which we must arive from a consideration of the authorities is that the systems and forms of legal

procedure adopted by the states, and impartially administered, will usually be held by the Supreme Court to be due process of law as far as the fourteenth amendment is concerned. * * * When, however under the pretense of altering or regulating the mode of enforcing the remedy, the statute clearly invades some substantive right, or when a statute, harmless on its face, is systematically enforced in a violation of fundamental rights, or when a court, transgressing its function, attempts to render a judgment without jurisdiction of the subject matter or notice to the party, the procedure is not due process of law, and may be declared void and set aside by the courts under the jurisdiction conferred by the fourteenth amendment."

In other words, while the state may establish its own system of taxation and, when established, it will amount to due process of law, yet, after the adoption of the system, it can not arbitrarily disregard and dispense with the procedure it has itself set up.

And the reason is plain, upon the most casual consideration. The term "due process of law," in matters of taxation, means "such process as is adapted (adopted?) to enforce a lien or specific charge upon the property specially assessed." So said the Supreme Court of Missouri in Neenan vs. Smith, 50 Mo. 525, and that the failure to observe and comply with such process is not due process of law follows as a corollary of the proposition.

Nor does the fact that the Supreme Court of Missouri affirmed the judgment establishing the lien in this case militate against the argument here advanced. If the assessment is an element of due process of law, it is no more possible for that court to render a valid judgment for a tax without an assessment than it would be to render judgment against a person of whom it had never acquired jurisdiction, and the one is as much a denial of due process of law as the other. The prevention of such results was the very object of the fourteenth amendment, and this court so declared in O'Keys case, 4 Wheat., 233-244, in Hurtado v. California, 110 U. S. 516, Yick Wo v. Hopkins, 118 U. S. 356, and many other similar cases. If the courts of a state may render judgments in the absence of jurisdictional facts, it is difficult to understand what this court meant when it said in

Kemmler's case, 136 U. S. 488, that the fourteenth amendment "forbids any arbitrary deprivation of life, liberty or property." If our contention that there was never any valid assessment, according to the law of Missouri, against the property of plaintiff in error, is correct, then it necessarily follows that the protection guaranteed him by the fourteenth amendment, and claimed by him, both in the trial court and in the State Supreme Court, was denied.

The ordinances of the City of St. Louis providing for the construction of the Vandeventer avenue sewer, as well as the provisions of the City Charter which have already been quoted, are assailed as violative of the fourteenth amendment to the Federal Constitution, in that, by their terms, a betterment tax is levied against the property of plaintiff in error, without regard to the question of corresponding betterments, and without notice of a hearing on that question, or opportunity to contest the existence of such benefits or the fairness of the apportionment of such benefits as may result between the several owners of the property within the taxing district.

It is contended here that the legislature has no power to authorize a municipal corporation to thus arbitrarily diminish the property of its citizens, or to give into its hand a method of assessment of special taxes which would in its application have that result, and that an assessment made under such an unrestricted rule is in itself illegal and void.

The betterment tax, or local assessment, is a subject which has long engaged the attention of the courts. It is not new, either in law or history. Even since 1427, when the statute of 6 Henry VI., c. 5, was enacted to prevent damage from inundation of the sea and to "apportion the work, or the expenses thereof, on those whose lands receive benefits therefrom," it has burdened those who have ever provided the greater part of the public revenue without enjoying any increased advantages, the owners of real estate.

Every theory of law has been strained to support this extraordinary power of government.

It was first supported upon the right of eminent domain.

People v. Brooklyn, *6 Barb. 209.*

Chicago v. Larned, *34 Ill. 276*, *l. c.*

But that gave too much opportunity to the property owner, and confined the exercise of the power to clear cases of public use.

Then resort was had to the police power of the state to abate nuisances.

Keese v. Denver, 10 Colo. 112.

But that was abandoned when it was made to appear that the owner may lawfully abate his own nuisance and save the profit of the contractor.

So in time the power to make these assessments was driven for refuge to the broad ground of the general taxing power, where it has since remained, and by the limits of which it must now be confined.

From the very first historical reference to this species of taxation, it is to be seen that the special benefit resulting to the property burdened was the justification for its imposition. Thus, in the "Inundation Acts" of 1427 (6 Henry VI., c. 5) the work, or its expense, was "apportioned among those whose lands received benefits therefrom;" and so it was in the act of 1667, providing for the rebuilding of London after the great fire of the preceding year.

19 Chas. II., c. 3.

There the mayor and aldermen were given power to cause the construction of drains, sewers and vaults, and to "impose any reasonable tax upon all houses within the said city and the liberties thereof, in proportion to the benefit they shall receive thereby for and towards the new making, cutting, altering, etc., and all and singular of the said vaults, drains, sewers, pavements and ditching aforesaid."

And so in the amendatory act of 7 Anne, c. 9.

The resulting benefit was recognized as essential in the earliest French legislation on the subject.

Clement, La Police sous Louis XIV., 144.

And so it is in that of Germany.

Preussisches Stadtrecht, pp. 375-386.

The theory of a corresponding benefit resulting from the improvement for the cost of which the assessment is made is the foundation of the right to make the levy, and this has long

been the contention of the courts and the textwriters in their attempts to distinguish it from fees, tolls, licenses and general taxes.

In re Mead, 74 N. Y. 216.
Macon v. Patty, 57 Miss. 378.
Hale v. Kenosha, 29 Wis. 599.
Birmingham v. Klein, 89 Ala. 461.
McCormick v. Patchin, 53 Mo. 33.

If there is no benefit there should be no tax, and if there be a benefit the tax should not exceed it in amount. This much, no doubt, our opponents concede, but we part company with them when we go one step further and say that there is no difference between benefits which do not exist at all and those which exist only by means of an arbitrary presumption. But, in either case they are lacking in fact and in the essential element of the right to impose the tax is absent.

If it be true that this right rests upon the corresponding benefit, then a rule of assessment and apportionment which expressly excludes consideration of the existence of that upon which the right rests must of necessity impair that right itself. The structure can not stand without its foundation.

"*Sublato fundamento cadit opus.*"

If the question of benefits is not considered, how can it be said that the assessment is made upon the resulting betterments? Can courts or legislatures say that in every case the resulting benefits are dollar for dollar and cent for cent the same amount as the cost of the improvement, and that each lot is benefitted in such proportion as its area bears to the whole district taxed? Such a presumption is as violent as it is arbitrary, and yet that is just what was indulged in here.

The city charter and the ordinances in question here assume, without anything upon which to base the assumption, that from the improvement for which the tax is levied there will be benefits, that those benefits will equal the exact cost and that each lot will receive the proportion of benefit which the size of each bears to the size of the whole district, after first deducting the area of the streets and alleys in the district. Even though it be admitted that abutting lots are necessarily bene-

fitted by the construction of a sewer, it does not follow that the benefits are equal to the total cost of construction, nor that each lot receives the proportion of benefit which its size bears to the size of the entire taxing district, after deducting the area of streets and alleys in the district. The fallacy of such a contention must be apparent on a moment's reflection. It lies in the fact that it determines a pure question of evidence by means of a mathematical calculation, yet this is the reasoning of the Supreme Court of Missouri and of all the courts which uphold assessments under statutes similar to the St. Louis Charter. They ignore the fact that the benefits may in reality be far less than the cost assessed, although the statute legislates the two into equality.

A recent example of the error into which these courts have fallen is furnished by the case of Conde v. Schenectady, 58 N. E. 130, where the objections of the property owner were disposed of by saying "that the land abutting on the street is benefitted by the pavement or re-pavement of the street, and should bear the expense, seems clear." But did it seem clear how much it was benefitted, or in what proportion the several lots taxed were benefitted? Every man knows that some lots receive a greater benefit than others from the same public improvement, and that the one receiving the greater benefit may be and often is the smaller in frontage or area, and courts will not pretend to be more ignorant than the rest of mankind.

In such cases the rule of assessment required by the St. Louis charter would be most unfair. One case proves the possibility of others, and how can they be separated under such a scheme of taxation? It is no answer to say that there are but few such cases. That is but a begging of the question. The vice of the method of assessment under the charter of St. Louis lies in the possibility of injustice which it presents.

Section 22, of Article VI, of the Charter of the City of St. Louis requires that, "as soon as the work of construction of a district sewer is fully completed, the Board of Public Improvements shall cause to be computed the whole cost thereof and shall assess it as a special tax against all the lots of ground in the district respectively without regard to improvements,

and in proportion as their respective areas bear to the area of the whole district, exclusive of the public highway."

This rule of assessment and apportionment is mandatory. It is a mere matter of mathematical calculation—a hard and fast rule which neither chance nor circumstance can change or alter. No other sum can be assessed against a lot than its proportion of the whole cost according to its area, and each must bear the burden of that amount, benefit or no benefit. The slightest variation from the result of the mathematical computation would invalidate the whole levy. The fixed rule of calculation, admitting of no relaxation, conclusively fixes upon the property owner the amount which he has to pay: Neither the assessor nor the assessed has any discretion or choice. Where such conditions exist, the law or ordinance authorizing the assessment is unconstitutional and void, irrespective of the question whether or not the property was actually benefitted to the amount of the tax.

And this is true because it rests upon a basis which excludes consideration of that which gives rise to the right to tax, the corresponding benefit.

The illegality is in the assessment, not in the amount assessed. Such a proceeding accomplishes the taking of private property for public use without just compensation and the diminution of the property of the citizen without due process of law.

The argument now advanced received the sanction of this court in what is commonly known as the Norwood case, 172 U. S. 269, where it was held that,

1. A state legislature can not confer on a municipal corporation authority to make an assessment for the cost of a public improvement conclusive on a property owner without providing him an opportunity to contest the question of corresponding benefits.

2. Any such assessment made under a law which does not afford the property owner an opportunity to be heard on the question of benefits and the fairness of tax, and does not empower the municipal authorities to consider this question in fixing the assessment, is a nullity.

These declarations of law apply with equal force in all cases where a like defect exists in the mode of levying the assessment, whether the improvement for the cost of which it is levied to be the construction of a street, alley, sewer or sidewalk, or the opening of a new street.

The method or rule of assessment is the issue in such cases, not the amount assessed, nor the purpose for which it was assessed. It was not the particular facts of the Norwood case which called forth that decision, but rather the disregard of constitutional rights underlying the rule of assessment there adopted. The assessment in that case was held invalid, not because the tax imposed exceeded the benefit, but because if it had the municipal authorities, under the statute authorizing the assessment would have been without power to correct the wrong and relieve the owner.

True, the Norwood case was a street-opening case, but that can not make any difference in the law pertaining to assessments for making streets or sidewalks, or building sewers, when the power involved rests on the same foundation.

The Supreme Court of Missouri, like the New York court in Conde's case (58 N. E. 130), labored to distinguish the Norwood case from cases involving assessments for construction of streets or sewers. It was said that, in the former, the issue was over a street opening and that the power of eminent domain was involved, while in cases such as that at bar, the assessment is made in the exercise of the power of taxation.

It is easy to see where the state court fell into error in its attempt at distinction. There was no dispute in the Norwood case over the right to compensation, but the question was how the expense should be assessed, and it would not have been otherwise had the abutting property been owned by some person other than Mrs. Baker, whose property was taken. The principle involved does not depend on the accident of ownership, nor the chance of the nature of the improvement. Equally fallacious is the reasoning of the New York court when it says that the object of opening a street may in special cases be, not to benefit the abutting land, but to afford access and communication between separate parts of the city or village, and thus inure to the advantage of the whole municipality, and that,

therefore, a distinction is to be made between a street-opening case and one involving the cost of a pavement. The vice of this argument is the same as that of the position taken by the Missouri courts and those of other states which refuse to follow the Norwood case—it assumes too much and proves too little. It assumes that the same thing (affording access to separate parts of the town) can not be the object of building a pavement or sidewalk, but it does not show the reason. And so, in the case at bar, the Missouri court assumed that some difference in the nature of the improvement for which the tax is levied required a different construction of the basic principle, but gave no reason for such a conclusion.

Shortly after the decision in the Norwood case, Judge Phillips, sitting in the United States Circuit Court, at Kansas City, had occasion to apply the test to the Missouri statutes authorizing special taxation, which, it may be said, are no different from the St. Louis charter, so far as the objection now urged is concerned, and the result of his deliberations was a very able opinion, holding the assessment void.

Fay v. Springfield, 94 Fed. 409.

The case was submitted upon an application for a preliminary injunction to restrain the issue of tax bills, and it was asserted that the ordinance providing for the assessment was void, for the same reasons we urge in the case at bar. That the exact point in controversy here was determined there, may be seen from a comparison of the statutes relating to such assessments with the similar provisions of the St. Louis charter.

Every possible effort was made by counsel for defendants in that case to avoid the controlling effect of the Norwood decision. It was pointed out that the ruling was made in a street opening case and was therefore not in point in the case of a tax for improvements; and that the statute of Ohio, under which that arose, was different from that of Missouri.

Answering this latter contention, the court said:

"How this difference in the two statutes is to help the defendants is not apparent. It only shows that it was in the mind of the legislature of Ohio, that the matter of apportionment of such burden could be predicated upon the basis of relative benefits bestowed upon the abutting property, or accord-

ing to the relative value thereof; whereas the Missouri statute contains no such provision whatever respecting betterments, or the relative value of the property touched. On the contrary, the Missouri statute provides absolutely, independent of any consideration of benefits conferred upon the lot-owner by the street improvement, and independent of any consideration of relative value of the property assessed, 'that the assessment shall be made, etc., in proportion to the front foot.' The Ohio statute further provided, in case an apportionment of the costs was directed on the basis of benefits, a method in advance of such assessment for ascertaining the benefits and apportioning the same."

These remarks fully dispose of the attempted distinction in this case.

The clear and concise opinion of Judge Phillips leaves so little to be said that further discussion of the questions involved would be but waste of time and space. Before dismissing the subject, however, we cannot refrain from inviting attention to these apt words of his:

"After thus recognizing the foundation of the rule of special assessments, it seems to my mind irreconcilably contradictory to say that the requirement is fully met by an apportionment based solely upon the frontage of lots on the street, without any regard whatever to the fact of whether or not the particular lot is benefitted at all by the work done throughout the length of the street improved, and without regard to the fact of whether or not the benefit bestowed is equal, as between all the lots fronting on the street."

And so it must seem to an impartial mind when the assessment is by the area rule for the construction of a sewer which drains a vast and populous district.

Following this case the decision of the Supreme Court of Texas, in the case of Hutcheson v. Storrie, 92 Texas, 685, which was an action upon a tax bill issued under the Charter of the City of Houston. Payment of the bill was resisted upon the ground that the provisions of the charter relating to such assessments and the resolution of the City Council for the particular assessment were unconstitutional, because the question of resulting equal benefits was ignored and the calculation made by a hard and fast rule admitting of no relaxation under any circumstances whatever. There was judgment against the

defendant below in conformity with a long line of State decisions approving such methods of assessment.

Pending the appeal the decision in the Norwood case was handed down, and the Supreme Court of Texas, recognizing the binding force of the decision of the United States Supreme Court, reversed the judgment and entered a decree for the defendant. The decision in this Texas case is interesting in the present discussion because it is so closely in point, as an examination will convince even the most doubtful.

In considering the arbitrary rule of assessment prescribed by the Houston Charter the court said: "There is no discretion lodged with the City Council in determining the assessment to be made upon the abutting property, but the Charter absolutely fixes the rule by which the assessment is to be governed and devolves upon the engineer the mere ministerial duty to ascertain by calculation what the work in front of the particular lot will cost, under the contract, according to the specifications. The law prescribed the standard to be the cost of work done in front of the lot, and the contract fixed the price. A calculation alone was necessary to ascertain the sum to be expended on the roll."

This is the vice of all these arbitrary assessments and it exists in the St. Louis Charter to even a greater degree. It will be noticed that the Houston Charter provided for something which the St. Louis Charter does not, the publication of a notice to all interested persons, after the assessment has been made, setting a time when objections might be urged, and to this extent at least it is less confiscatory than our own. Nevertheless, that faint spark of regard for property owners' rights failed to save it from condemnation.

In the later case of Lyon v. Tonawanda, 98 Fed. 363, the same facts called forth like rulings. There the court reviewed the Norwood case and applied it to the New York statute, discussing also Fay v. Springfield, heretofore commented upon. Of that statute it was said: "The New York law, in failing to provide any method for ascertaining and apportioning benefits, resembles the Missouri statute considered in the Fay case, *supra*, more closely than the Ohio statute."

Of like effect was the opinion in Charles v. City of Marion,

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98 Fed. 166, where Judge Baker granted a temporary injunction against a special tax assessment on the same grounds.

The Indiana statute involved in that case was of the same nature as the St. Louis Charter, save that it, like the Houston Charter, provided for a notice and hearing of objections after the assessment had been made. The opinion loses none of its persuasive force because delivered on an application for a temporary injunction, and those who criticize it upon that ground pay but small compliment to the eminent jurist who wrote it.

The same ruling was made in Loeb v. Trustees, 91 Fed. 37.

Again, in Parker v. Detroit, 103 Fed. 357, the Norwood case was followed, and the Circuit Court, after summing up the provisions of the Detroit Charter, sustained the claim of complainants that the system of assessment was illegal on the same objections as here urged against the St. Louis Charter, and said:

"The case of Norwood v. Baker is the foundation for this position, and seems fully to sustain it."

It there appeared that the Charter of Detroit authorized the assessment of the entire cost of the improvement upon the property in the taxing district and the apportionment of the tax by the front-foot rule, but no tribunal was empowered to review the assessment or the apportionment, or to correct any hardships which might result from that rule. These were the grounds for the application of the principles announced in the Norwood case, and they are present in more aggravated form in the case at bar.

In Indiana the Norwood case has been recognized and followed. The case of Adams v. Shelbyville, 154 Ind. 467, presented to the Supreme Court of that state the same questions here in dispute, although the facts of the case were much more different from those of the Norwood case than are the facts of that now at bar. That court held that while the legislature may declare conclusively that only the property in the taxing district shall be specially assessed for the cost of a local improvement within the district, yet the district as a whole can be assessed only to the extent of the resulting benefits, and those benefits must be apportioned upon the several lots according to the benefit derived by each; that any excess of cost

must be borne by the city at large, and that in all such cases the property owners are entitled to a hearing on the question of benefits.

Tested by the rule thus stated, it will be seen that the Charter of St. Louis falls far short of the requirements of validity. It goes further than any statute or charter examined and judicially condemned in all of the cases which follow the doctrine of the Norwood case. It not only determines conclusively that the property in the taxing district is benefitted, but also that the benefit as a whole is equal to the cost of the improvement and that each lot is benefitted in proportion to its size. It authorizes an "illegal assessment under a rule or system which violates the constitution, in that the entire cost is imposed upon the property taxed without any reference to special benefits." It prescribes a hard and fast rule of mathematical computation.

All that need or can be done in making the assessment is a mere matter of simple arithmetic, the calculation of the total square feet in the district and of the number contained in the lot, the addition of the cost and its division in the ratio of the lot's area to that of the district. It needs no unusual degree of mental ability to discover that in such procedure the question of relative benefits can have no place. It is the size of the lot, not the benefit bestowed, which determines the amount of the tax. Any other consideration is absolutely excluded.

Moreover, even were it possible to consider the matter of benefits, that matter could not affect the result. The legislative determination is quite as binding upon those who assess as on those who have to pay. Had the Board of Public Improvements assessed any other sum than that resulting from the mathematical calculation, the whole assessment would have fallen. That body had no power to raise or lower any particular assessment, but could only make the calculation. Nor could the property owner obtain relief from unfair assessment in any other tribunal. He could not defend on the ground that his property was not benefitted.

Such was the ruling of the Supreme Court of Missouri in the case of Keith v. Bingham, 100 Mo. 300; Nevada v. Eddy, 123 Mo. 546, and many others, and that is still the law in Missouri.

The opinion of that Court in Bank v. Carswell, 126 Mo. 436, is not to the contrary, because, in that case, the assessment was not by the front-foot or area rule, but according to the assessed value of each lot. But even if the latter opinion is in conflict with what that court had previously held, it would be, in the words of Judge Phillips, "a remarkable achievement of tergiversation." (*94 Fed. 419, l. c.*)

Every opportunity to resist confiscation of private property was cut off from property owners. The city authorities were powerless to grant them relief and the courts refused their aid, leaving them helpless victims of this "governmental function."

Even if the ordinances and the charter of St. Louis provided for the most solemn notice to the property owners, the constitutional requirements would remain unsatisfied unless provision was made for the correction, by some competent tribunal, of erroneous or oppressive assessments.

Williams v. Supervisors, 21 Fed. 99.

But the inherent vice of the charter and the ordinances which follow it, as said Judge Phillips in the Fay case, "lies in the unbridled discretion conferred upon the municipal council, and the impossibility thereunder of judicially ascertaining what was in the mind of each member of the board in making the assessment."

Viewed in the light of the authorities cited, and considered in connection with the rule established by the decisions of the courts of last resort in Missouri, the Charter of the City of St. Louis and the ordinances in question in this case are confiscatory in their nature and violative of the constitutional rights of the plaiutiff in error. Under these enactments, the area of the public streets and alleys is deducted from the area of the entire taxing district before the apportionment between the several lots is made, thus exempting the public property from any expense, while giving it the same benefits and advantages enjoyed by the private property taxed. In this manner the City of St. Louis receives benefits without contribution, and, under the guise of a betterment tax, the expense of performing the municipal duty in the drainage of streets and alleys is levied upon the property owner.

Out of a total of five hundred and twenty-five (525) acres in

the Vandeventer sewer district nearly one-fourth was streets and alleys, as the undisputed evidence shows, but nevertheless the cost of draining the entire five hundred and twenty-five (525) acres was assessed against those who owned but four hundred (400) acres. This fact, more eloquently than any argument, demonstrates the injustice and illegality of the assessments for sewer construction under the St. Louis Charter. Even under the rule laid down by the Supreme Court of Indiana in Adams vs. Shelbyville it is unconstitutional and void.

It is a matter of regret that innocent persons may have become involved in financial loss through the enactment of unconstitutional legislation, and that temporary inconvenience in the administration of public affairs may follow its condemnation as such, but the constitutional guarantees are of more importance than considerations of convenience to municipal corporations or those who contract with them on the faith of their unlimited power in charging the property of their citizens.

As said the Supreme Court of Texas: "Justice will be best preserved by upholding the limitations against the exercise of arbitrary power."

And so in this case, where the vice of the rule employed in making the assessment is even greater than that of the Ohio statute or the Charter of the City of Houston, where it appears that the very purpose of the legislation for assessment was to deprive the property owner of his inherent rights and to vest the city officers with a high prerogative of government, unrestricted by judicial interference, we respectfully submit that the judgment of the Supreme Court of Missouri should be reversed.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Feb. 26, 1901.

No. 550.

JOHN L. SHUMATE ET AL., PLAINTIFFS IN ERROR,

vs.

AUGUST HEMAN, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

DAVID GOLDSMITH,
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(18,035.)

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STATEMENT OF FACTS.

Suit was instituted herein by August Heman for the enforcement of a special-tax bill issued by the city of St. Louis for the construction of a sewer in what is called Euclid Avenue sewer district number 1, the same amounting to ninety-eight dollars and seven cents. The trial did not occur until many years after the tax bill was issued, and then resulted in a judgment in favor of Mr. Heman. The defendants thereupon appealed to the supreme court of Missouri, where

the judgment of the trial court was affirmed, the case being reported as Heman *v.* Allen, 156 Mo., 534, and after such affirmance the defendants brought the proceeding to this court by writ of error.

The principal provisions of the charter of the city of St. Louis bearing upon the matter involved are sections 21, 22, and 25 of article VI. These will be found on pages 2512, 2513, and 2514 of the second volume of the Revised Statutes of Missouri of 1899, and we attach a copy of them as an appendix to this brief.

Under these provisions sewers in the city of St. Louis may be either public sewers, district sewers, or private sewers; and for the purposes of this proceeding we are only concerned with the district sewer. Under the charter a sewer district is first established and its limits prescribed by the municipal assembly, and then, whenever the majority of the property-owners resident in the district shall petition therefor, or whenever the municipal board of public improvements shall recommend it as necessary for sanitary or other purposes, a district sewer is constructed in the district.

Every such district sewer drains only its own district, and the provision with regard to the assessment of its cost is as follows:

"As soon as a district sewer, with its inlets, manholes, and other appurtenances, is fully completed, the said board shall cause to be computed the whole cost thereof, and shall assess it as a special tax against all the lots of ground in this district respectively, without regard to improvements, and in proportion as their respective areas bear to the area of the whole district, exclusive of the public highway."

Every district sewer must be constructed so as to connect with either a natural course of drainage or with a public sewer, and from this requirement it necessarily follows that one district sewer may not empty into another, and that each district sewer must in its use necessarily be limited to the drainage of its own district. It is on account of this that the occasion arises for public sewers.

"The city has no right to burden one sewer district with the expense of constructing a sewer larger, and necessarily more costly, than necessary to drain the district in which it is constructed" (Eyerman *v.* Blaksley, 79 Mo., 152).

The purpose of the entire system of the sewers of the city is the drainage of sewage into the Mississippi river, but it is evident that many district sewers, and probably most of them, can have no direct connection with that river; and inasmuch as the conveyance of the sewage by means of water-courses must necessarily be limited, it follows that most of the sewage must be conveyed from district sewers to the river by some other sewer. The sewer which subserves this purpose is called a public sewer, and its cost must be wholly paid out of the public revenue of the city. The city must also, under the provisions of section 22 of article VI of its charter, pay out of its general revenue "the repairs and other incidental expenses of district sewers."

It follows that private property does not, under the charter, defray the entire expense of the construction of sewers for its own drainage, and that it does not pay any part of the cost of the maintenance of the sewers after their construction. It is assessed only for its proportionate share of the cost of the district sewer in its own district, and the cost of the

public sewer which conveys the sewage from the mouth of the district sewer to the Mississippi river, as well as the entire cost of the maintenance of all district sewers and all public sewers, is paid by the city at large. Moreover, inasmuch as the share of each lot is fixed in accordance with the ratio which its area bears to the area of the entire district, it follows, as we think, that each lot pays precisely for its own drainage, so far as the same is effected by the district sewer, and for nothing else.

ARGUMENT.

I.

We take it that the sole question which is to be considered by this court in the present cause is that of the constitutionality of the assessment involved. The reliance of the plaintiffs in error in combatting the validity of this assessment is, and of necessity must be, based exclusively upon the decision of this court in—

Norwood *v.* Baker, 172 U. S., 269.

The question of the effect of that decision is also brought before this court by a number of other causes, differing, however, from the one in which we are engaged in that the assessment in litigation in each of them is for the paving of a street.

The case of *Norwood v. Baker* is also of that character, and therefore an inquiry arises in the present cause which is not involved in the others, namely, whether, even if the Norwood case goes to the extent claimed for it by the plaintiffs in error and their associates, the ruling is applicable to the present assessment for a sewer.

The point in issue as to the effect of the Norwood case is whether it is consistent with the power of the legislature of a State to assess the cost of a street improvement upon abutting property, and to apportion that tax among the different lots according to their respective frontage, without right on the part of the property-owner to deny the existence of special benefits to the extent of the assessment, or

whether it secures to a land-owner in every case the right at some stage of the proceeding to contest the amount of the special benefit to his property. That question we will naturally consider hereinafter; but we mean to maintain that, even if the latter view, which is that contended for by the plaintiffs in error, were the correct one, it would not invalidate the assessment for sewers in our case.

The assessment in the Norwood case was held by this court to have been a species of taxation, and its legality was considered only from that standpoint. The assessment involved in this case may be sustained on the same theory; but it may also be predicated upon the *police powers* of the State, and in consequence be upheld even when powers of taxation would fail.

That a distinction of this character exists is recognized by a considerable number of very high authorities *and, is, so far as we know, disputed by none.*

Thus it has been held in Pennsylvania (*Pittsburgh Orphan Asylum's Appeal*, 111 Pa. St., 135) that property fronting upon a street could not be taxed for the reconstruction of the street after it had been assessed with the cost of the original paving; but the court, in so holding, draws a distinction between an assessment for street paving on the one hand and one for sewers on the other, and also between an assessment for street paving and one for sidewalks, saying:

"We can readily understand why the cost of constructing and maintaining a sewer, which is designed for the drainage of a particular street or locality, and which is essentially necessary for the health, comfort, and convenience of the inhabitants dwelling along such street or in such locality, should be assessed upon the property of the district thus

benefited, for the improvement as well as the use is local, and the benefit to the public is but secondary. So with a sidewalk, without which a house in a town or city cannot be said to be finished. But when we come to a street or other highway, which is primarily designed not for the welfare or use of the inhabitants of any particular locality, but for the public at large, the case is very different."

To like effect is *Smith v. Kingston Borough*, 120 Pa. St., 363, 364.

In *Palmer v. Way*, 6 Colo., 106,* it was held that the constitutional requirement for uniformity of taxation operated as a limitation upon local assessments for street improvement, but that an assessment for the paving of a sidewalk could be maintained as an exercise of the police power, and that the owners of lots abutting on streets could therefore be required to construct sidewalks in front of their respective lots at their own expense.

Subsequently the legality of an assessment of the cost of sewers against property in the sewer district, which was made according to area and not based upon value, benefits, or improvements, was likewise held to be valid in *Keese v. City of Denver*, 10 Colo., 112. The same holding was again made in *City of Pueblo v. Robinson*, 12 Colo., 593, where the court said:

"It has been held that the word 'taxes,' as used in the section last referred to, does not include special assessments against property specially benefited by the local improve-

* This case was overruled as to its holding that this constitutional provision was applicable to local assessments (Denver City *v.* Knowles, 17 Colo., 204), but this fact does not detract from the distinctions made while it was in force.

ments; but the decisions of this court are to the effect that such assessments cannot be upheld under the uniformity rule of taxation, unless the improvements are clearly within the domain of police regulations. * * * Sewer assessments are within this police power."

Judge Cooley in his work on taxation (second edition, p. 590) also recognizes the constitutionality and propriety of sewer assessments on the same ground. He says:

"There seems to be no legal impediment to a requirement under the police power that lot-owners in cities and villages shall be at the expense of constructing that part of the public sewer in front of their respective premises. It is true that the levies for the purpose of constructing sewers and of keeping them in repair are commonly spoken of as taxes; but, as has been justly remarked, there is just as much reason to subject the owners of land abutting to contribution of their expenditure, as there is to oblige them to pave the footways in front of their grounds, or to keep the same in repair when the city shall pave the streets adjoining. It should be a charge on the land just as is the requisition on the owners of land abutting on the streets to clear away the snow at their own expense, which has been determined to be a reasonable provision."

It will be noticed that the author assimilates an assessment for the construction of sewers to one for the construction of sidewalks, and this similarity is generally recognized by the various decisions on the subject. At the same time it seems to us that the burden of defraying the cost of sewers may be imposed as an exercise of the police powers even more clearly than a charge for the construction of sidewalks. Between the assessment for street paving and the assessment of sidewalks there is much greater similarity in purpose,

and also much greater similarity in the extent of the benefit enjoyed by the public, than in the construction of sewers for the sole purpose of draining the property assessed therefor. The sidewalk is really a part of the street, and, though more closely connected with the use of adjacent premises than the street proper, the difference in its relation to the property is more one of degree than kind.

In the case of sewers the distinction is clearly one of kind, and the right of assessment as a police regulation seems to us beyond reasonable controversy. In point of utility to the premises taxed the sewer is also more of an improvement for the special benefit of that property than a sidewalk, and is of usefulness for public purposes only in the general sense that all police regulations, and for that matter all legislation, are made in furtherance of the public welfare.

The following authorities, which maintain that restrictions upon the legislative or municipal power of assessment for street improvements proper do not apply to the assessments for the construction of sidewalks, therefore, support our claim of a clear distinction in favor of assessments for sewers, and this, whether the distinction in the case of sidewalks be strictly attributable to the police powers of the State or rests on other considerations:

James *v.* Pine Bluff, 49 Ark., p. 202 *et seq.*
Wilson *v.* Philippi, 39 W. Va., pp. 82, 83.
State *v.* Newark, 37 N. J. L., p. 423.
Macon *v.* Patty, 57 Miss., 406.
Sands *v.* Richmond, 31 Gratt., 571.

It was held in Arkansas that a constitutional provision, requiring all taxes to be uniform and all property to be assessed in accordance with its true value in money, applied to assessments for street improvements, and that such assessments would therefore be invalid if made according to frontage (Peay *v.* Little Rock, 32 Ark., 31); yet it was held, in *James v. Pine Bluff, supra*, that a statute conferring on cities the power to require lot-owners to build and maintain suitable sidewalks along their premises was not in contravention of the constitution, it being a delegation of the police power of the State. This case practically follows the course of decision adopted in Colorado in the cases hereinbefore cited in support of sewer assessments.

An ordinance similar to that involved in James *v.* Pine Bluff came before the supreme court of Mississippi in *Macon v. Patty, supra*. Without going into the full course of argument adopted by the court, we quote the following, which expresses its conclusion:

"We conclude, therefore, that it is now established that these local assessments are not within the unrestricted discretion of the legislature; that they are subject to many and just limitations which the court will enforce; and that among them is, that the assessment cannot be imposed upon an individual alone, but must be apportioned among a subdistrict of several. *If this were a local assessment it would be void for the reason stated.* The improvement, however, is the repair of a sidewalk, not a street, and it seems to be well settled that the paving and repairing of a sidewalk in front of the owner's property may be imposed upon him as a police duty."

The case of State *v.* Newark, *supra*, is one of two cases in which, so far as our research has gone, the power of the

legislature to determine the amount of local assessments and to apportion it according to some general reasonable rule is denied on general principles—that is, without reference to special constitutional requirements in relation to taxation. The *syllabi* of that case are as follows:

"1. The statute authorizing the expense of paving the road-bed of a city street, to be assessed in proportion of two-thirds on the property abutting on the street and the remaining one-third on the public at large, is unconstitutional.

"2. Assessments for local improvements of this character may be made against the property peculiarly benefited, but such assessments must be made to the extent only of such peculiar benefits."

Yet, though such was the ruling of the court in respect to street improvements, and it will be observed that it is precisely the ruling for which the plaintiffs in error contend in the present case, the court expressly distinguished assessments for sidewalks, using the following language:

"I think the difference is a substantial one. A sidewalk has always, in the laws and usages of this State, been regarded as an appendage to, and a part of, the premises to which it is attached, and is so essential to the beneficial use of such premises, that its improvement may well be regarded as a burden belonging to the ownership of the land, and the order or requisition for such an improvement as a police regulation. On this ground I conceive it to be quite legitimate to direct it to be put in order at the sole expense of the owner of the property to which it is subservient and indispensable."

The other cases above cited recognize that the distinction in favor of sidewalk assessments has been based upon the

intervention of the police powers of the State, but proceed also upon the idea that the utility of sidewalks to premises is greater than that of streets proper, and that the assessment therefor according to frontage is generally more uniform and reasonable, and this leads us to point out that, even if the assessment involved in the case at bar be considered from that standpoint, its validity can be maintained.

From what we have mentioned in our statement of facts it appears that the sewer in this case was built exclusively for the benefit of the property which was assessed for it. It drained all the property in a certain district, whose limits were prescribed, and nothing else, and its cost was assessed against all that property and apportioned in accordance with the precise benefit derived by the lots from it, viz., in proportion to their respective areas.

In the case of streets, and even of sidewalks, it may be said that the public enjoys the use of the improvement, and therefrom it may be argued that the municipality should defray out of its own funds a portion of the cost of the improvement. This, however, cannot be said in the case of a sewer built under laws like those giving rise to the assessment in this case. The public made no use of the sewer for which that assessment was made, and enjoyed no benefit therefrom. It is true there may have been openings in the sewers from the streets which carried off surface waters, though we do not recall that this appeared in evidence. Yet, even if this limited drainage existed, it was for the benefit of the abutting property, and it was within the power of the legislature to assess that property without deduction therefor, just as the legislature may impose a tax for the sprinkling of streets on abutting property or require

owners to remove snow and ice from adjacent highways. *Reinker v. Fuehring*, 130 Ind., 382; *Goddard v. Petitioner*, 16 Pick., 504; *Village of Carthage v. Frederick*, 122 N. Y., 268. Indeed, the drainage of the streets was plainly for the use and benefit of the premises abutting on them. The advantages derived by the property from the sewer would certainly have been lessened if surface water had been left undisposed of in the adjacent streets.*

We submit, therefore, that the sewer tax in question may be defended under the sovereignty of the State in the exercise of its police powers, and therefore be upheld without regard to the question of special benefit and without regard to the present controversy as to the extent of the ruling in Norwood *v.* Baker, and, moreover, that inasmuch as the sewer giving rise to the assessment in question was constructed only for the drainage of the district assessed, afforded drainage to every lot in that district, and therefore benefited each lot in proportion to its area, the language of the majority opinion in Norwood *v.* Baker, condemning an "exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him," whatever may be its proper effect, may be said as matter of law to have no application.

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* To demonstrate the insignificance of this claim, we further submit the following: Even if the drainage of the streets were to be considered, no substantial deduction could be made on account of it. Only surface water is drained from streets, but both sewage proper and surface water from private property. Yet, if streets and private property derived the same advantages in every respect from the sewer, the deduction could not exceed the ratio of the area of the streets to the area of the district. That would be small, and it would, moreover, be offset by the outlay made by the city for the drainage of the district by payment of the cost of the construction of public sewers, and of the maintenance of both public and district sewers, to which reference has been made in our foregoing statement of facts.

II.

We now come to the question of the effect of *Norwood v. Baker*.

That question has been before a number of courts. In *Hutcheson v. Storrie*, 92 Tex., 685; *Adams v. Shelbyville*, 154 Ind., 467, and in a number of decisions rendered by United States circuit courts, *Norwood v. Baker* has been declared to hold that local assessments for street improvements could not exceed the special benefits derived by the property assessed, and could not be made without notice to the landowner and an opportunity to be heard in relation to the extent of those benefits; and such the plaintiffs in error now contend is its effect.

On the other hand, in North Dakota, in *Webster v. City of Fargo*, 82 N. W. Rep., 732; in New York, in *Coude v. City of Schenectady*, 58 N. E. Rep., 130; in Michigan, in *Cass Farm Co. v. City of Detroit*, 83 N. W. Rep., 108, in Missouri, in this cause, and more fully in *Barber Asphalt Co. v. French*, 58 S. W. Rep., 934, and in Massachusetts in *Sears v. Boston*, 173 Mass., 71, the opinion of this court in *Norwood v. Baker* has been held to be based upon and have relation only to the peculiar features of the case, and not to reflect upon the validity of the frontage rule of assessment under ordinary circumstances, nor to limit the power of the legislature to apportion local assessments by any rule productive, upon the whole, of approximate equality.*

This conflict in the authorities at once suggests the proba-

* We understand that a like ruling was recently made by the supreme court of Pennsylvania in *Harrisburg v. McPherran*, which has not yet been reported.

bility that the majority opinion of this court in *Norwood v. Baker* contains expressions which appear to support either of the constructions thus given to it. Indeed, this seems to be conceded by the courts before which its effect has come into question.

Under these circumstances, before entering into any discussion of the conflicting views taken of that case, we deem it advisable to first consider in a cursory way the state of judicial opinions and adjudications at the time when the case was decided, and also the prior rulings of this court in relation to its subject-matter. Indeed, it would, in any case involving the scope of the matter now under discussion, be difficult to arrive at any satisfactory conclusion in any other manner.

The state of the law in regard to the constitutionality of local assessments was, in its general application, very clear at the time of the decision by this court of *Norwood v. Baker*. In some of the States such assessments had been declared invalid on account of peculiar constitutional provisions with which we are not now concerned. This was the case in Arkansas and in Tennessee, and at one time in Alabama, Colorado, Illinois, and Minnesota, though the rule in Alabama and Colorado was subsequently changed by judicial declaration, and in Illinois and Minnesota was subsequently altered in consequence of constitutional amendments (see notes on pages 505 and 506 of volume 25 of the American and English Encyclopædia of Law, "Taxation"). In two States, South Carolina and New Jersey, local assessments pursuant to arbitrary rules prescribed by legislature were declared invalid on the very ground which is invoked to defeat the assessments in litigation in the cases at bar, namely, that it was beyond the power of the legislature to

apportion those assessments according to any fixed rule, but that the assessment must, with respect to each lot, correspond with the special benefits actually derived and be based upon an ascertainment of such special benefits upon hearing and notice in some form. Wherever the frontage rule of assessment has come into question in other States its validity has been sustained. We will not undertake to cite authorities from all the States in which this has been done, but content ourselves with mention of the following:

Speer *v.* Mayor of Athens, 85 Ga., 49.
City of Fort Wayne *v.* Cody, 43 Ind., 197.
Meggett *v.* Eau Claire, 81 Wis., 326.
White *v.* People, 94 Ill., 604.
Rolph *v.* City of Fargo, 7 N. D., 640.
English *v.* Williams, 2 Marv. (Del.), 63.
Northern Ind. R. R. Co. *v.* Connelly, 10 U. S., 159.
Cleveland *v.* Tripp, 13 R. I., 50.
Whiting *v.* Townsend, 57 Cal., 519.
Daily *v.* Swope, 47 Miss., 367.
Parker *v.* Challis, 9 Kas., 155.
State *v.* Reis, 38 Minn., 371.
Preston *v.* Reid, 84 Ky., 154, 155.
Davis *v.* Lynchburg, 84 Va., 870, 871.
City of Parkersburg *v.* Tavenner, 42 W. Va., 489.
Allen *v.* Drew, 44 Vt., 174.
City of Kalamazoo *v.* Francoise, 115 Mich., 554.
Moberly *v.* Hogan, 131 Mo., 19.
People *v.* Brooklyn, 4 N. Y., 419.
Spencer *v.* Merchant, 100 N. Y., 585.
City of McKeesport *v.* Busch, 166 Pa. St., 46.
Warren *v.* Henley, 31 Iowa, 31.

This condition of the authorities supports the following remark, which will be found in Elliott on Roads and Streets, page 393:

"The weight of authority, however, is *overwhelmingly* in favor of the right of the legislature to determine what property shall be assessed and how the apportionment shall be made."

All the authorities upholding the power of the legislature to assess the cost of street improvements upon abutting property according to frontage recognize that the power of assessment can only be predicated on the existence of special benefits to the property assessed, and, with this as the acknowledged basis of taxation, they proceed upon either one or both of these theories, namely:

(1.) That, inasmuch as the assessment is a phase of taxation, it is a legislative function; that, by making it, the legislature determines the existence of the benefits; and that such determination is conclusive.

(2.) That no method of apportionment can be devised which, in its practical operation, will be productive of fairer results than that resulting from the method of apportionment according to frontage or area.

We now turn to the adjudications of this court in order to ascertain its rulings upon the subject.

Various cases which involved the constitutionality of the species of taxation under discussion were brought to the Supreme Court of the United States before that of *Norwood v. Baker* came before it. It will not be necessary to consider them all, since they are all uniform in their maintenance of

the validity of the legislation involved; the most important of them, those in which there exists the greatest similarity with the case at bar, will do.

One of the earliest of these is *Willard v. Presbury*, 81 U. S. (14 Wall.), 676, wherein it was held:

"Congress has power to confer on the city of Washington authority *to assess upon the adjacent proprietors of lots* the expense of repairing streets with a new and different pavement, or of repairing an old pavement."

This was followed by a number of decisions, among which was *Spencer v. Merchant*, 125 U. S., 345. This case involved the power of the legislature of New York to impose the cost of the improvement of a street on abutting property. The validity of the tax was attacked both in the court of appeals of New York, from which the appeal was taken, and in this court on the same constitutional grounds as are now invoked in the case at bar. In disposing of this attack, this court quoted the following from the decision of the State court with strong approval:

"By the act of 1891, the legislature imposes the unpaid portion of the cost and expense, with the interest thereon, upon that portion of the property benefited which has thus far borne none of the burden. In so doing, it necessarily determines two things, viz., the amount to be realized, and the property specially benefited by the expenditure of that amount. The lands might have been benefited by the improvement, *and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, it is not open to our review.* The question of special benefit, and the property to which it extends, is of necessity a question of fact, and when the legis-

lature determines it in a case within its general power its decision must, of course, be final."

Speaking for itself, this court says in the same opinion:

"When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. *But the legislature has the power to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not,* but only upon the validity of the assessment and its apportionment among the different parcels of the class which the legislature has conclusively determined to be benefited."

In *Walston v. Nevin*, 128 U. S., 578, the question again came before this court. In that case the validity of a statute of Kentucky was in question. That statute provided for the improvement of streets, alleys, sidewalks, etc., and directed that:

"Such improvements shall be made *at the exclusive costs of the owners of lots* in each fourth of a square, to be equally apportioned by the general council *according to the number of square feet owned by them respectively*, except that corner lots (say thirty feet front and extending back as may be prescribed by ordinance) shall pay 25 per cent. more than others for such improvements. Each subdivision of territory bounded on all sides by principal streets shall be deemed a square."

This statute was upheld as being entirely consistent with the provisions of the amendments to the Federal Constitution, the court saying:

"*So the determination of the taxing district and the manner of the apportionment* are all within the legislative power (citing decisions), and whenever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied."

In *Parsons v. District of Columbia*, 170 U. S., 45, a question similar in principle was involved, the only difference being that therein a local assessment was made for the cost of water mains and at a fixed rate per front foot against all abutting property. The decision of the court may be best stated in the language of one of the *syllabi*, which is as follows:

"The enactment by Congress that assessments levied for laying water mains in the District of Columbia should be at the rate of $1.25 per linear front foot, against all lots or land abutting upon the street, road or alley in which a water main shall be laid, *is conclusive alike of the necessity of the work and of its benefit as against abutting property.*"

We submit that, in this state of its own decisions and of the authorities elsewhere, it is not to be supposed that this court would overturn the law thereby established *without an explicit and unequivocal expression of its purpose.* That this is lacking must be conceded.

On the contrary, the majority opinion of this court cites and quotes from its own prior decisions, maintaining the conclusiveness and validity of fixed legislative assessments, and expressly declares: "It has been suggested that what

has been said by us is not consistent with our decision in Parsons *v.* District of Columbia, 170 U. S., 45, 52, 56. But this is an error." We submit, by way of comment, that so long as the Parsons case is treated as a correct exposition of the law, the system of taxation under discussion is safe from attack on the constitutional ground now invoked against it.

And, in this connection, it is further to be remarked that of all the jurisdictions whose decisions were cited in the majority opinion the State of New Jersey alone denied the power of the legislature to apportion local assessments.

The Norwood case really turns upon the exceptional features presented by it, and is not at all of the wide application which is being claimed for it. The case establishes only the invalidity of the particular law for local assessments which came under consideration in it. Under that law a street in the village of Norwood was extended for the space of three hundred feet through the property of one Baker, and, though an allowance of $2,000 was made as damages for the strip of land taken, the whole thereof, together with costs amounting to $218.58, were reassessed as benefits upon the land from which the strip was taken, without any proof or finding as to the extent of the benefits. For all this the law provided. With one breath it gave compensation for the strip taken; with another it provided that the adjacent property, and consequently that from which the strip was taken, should be assessed for the entire amount of the damages and of the costs, thus completely vitiating the allowance for damages, and making the land-owner part with his property and pay the costs of the proceeding in addition.

That this is what this court deemed the vital matter of

the controversy, and which it condemned, appears from the following extract from the majority opinion:

"It will not escape observation that, if the entire costs incurred by the municipal corporation in condemning land for the purpose of opening or extending a street can be assessed back upon the abutting property, without inquiry in any form as to the special benefits received by the owner, the result will be more injurious to the owner than if he had been required, in the first instance, to open the street at his own cost, without compensation in respect of the land taken for the street; for, by opening the street at his own cost he might save at least the expense attending formal proceedings of condemnation. It cannot be that any such result is consistent with the principles upon which rests the power to make special assessments upon property in order to meet the expense of public improvements in the vicinity of such property."

It is apparent that the validity of a law which provides for such a result, and of a proceeding which accomplishes it, cannot determine the validity of a law which imposes the cost of a street pavement or sidewalk upon abutting property in proportion to the frontage, or which charges the cost of a sewer upon the property drained in proportion to the area.

Much is made of the fact that the *Norwood case* asserts with great vigor that the right of local assessment is based on the theory of special benefit to the property assessed, and that every such assessment is invalid in so far as it substantially exceeds that benefit.

But there is nothing new or startling in this declaration, nor is it hostile to the manner of the apportionment of the costs of local improvements with which we are concerned.

All the jurisdictions which sustain that manner of apportionment are in accord with it.

It is one thing to say that the legislative action is based and maintained upon the theory that the property assessed derives special benefit to the extent of the tax, and another to say that the existence of the special benefit as determined by the legislature is always open to question—indeed, that an opportunity to question it must be afforded. In what other field of legislative discretion may this be claimed; in the exercise of what other function must the legislature in every case submit the correctness of its action to inquiry?

Local assessments can be justified only on the theory that they are based on special benefits; but some one must determine whether and to what extent those benefits exist. This inquiry *is not judicial*, as in the case of the exercise of the right of eminent domain, *but is legislative*, and the conclusiveness of the legislative determination necessarily follows, subject only to judicial interference when there is a palpable perversion of the power. All this is implied in the declaration which is to be found in *Norwood v. Baker*, and the mass of other decisions on the subject, that the assessment is a form of the power of taxation. Yet, may we ask, in what respects does the assessment partake of the essential characteristics of taxation or, lack those of eminent domain, if its amount is not to be fixed by the legislature, but must be ascertained in every instance as matter of fact on notice and hearing?

We maintain that the majority opinion in *Norwood v. Baker* does not seek to overthrow the legislative discretion in these matters, or the conclusiveness, in general, of the action of the legislature, but merely to hold that the power is not so unlimited that an abuse of it may not be checked.

This is to be gathered from the following extracts from that opinion:

"And according to the weight of judicial authority, the legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, and which may be subjected to special assessment to meet the cost of such improvements. * * * Neither can it be doubted that, if the State constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement."

"But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property."

And the following remarks, made in the majority opinion in connection with a quotation from Dillon on Municipal Corporations, point to the same conclusion:

"While recognizing the fact that some courts have asserted that the authority of the legislature in this regard is quite without limits, the author observes that the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan and Pennsylvania, is to hold that the legislative power *is not unlimited*, and these assessments must be apportioned *by some rule capable of producing reasonable equality*, and that provisions of such a nature as to make it *legally impossible* that the burden can be apportioned with proximate equality are arbitrary exactions, and not an exercise of legislative authority."

If our foregoing analysis of the Norwood case is correct, it merely holds that, under the facts presented in it, there was

a gross inequality of taxation, a virtual confiscation of property, and a consequent abuse by the legislature of its constitutional powers.

If we give the case that effect, we can clearly understand the foregoing declarations of the majority opinion that the legislature may determine "what property shall be considered as benefited," but that its discretion may not be so exercised as to make an apportionment with approximate equality "legally impossible"—declarations which are utterly irreconcilable with the contentions of the plaintiffs in error, since those contentions deny to the legislature any power of apportionment whatever, and require an assessment of every special benefit upon notice and hearing.

If we give the case that effect, it accords with the general current of the authorities which uphold the power of the legislature to apportion local assessments, and more especially those of them which are cited in the majority opinion, in one of which (Allen *v.* Drew, 44 Vt., 187, 188) we find the following exposition of the law:

"The power of taxation implies apportionment, and when the legislature have exercised the right and made the apportionment, a court should not declare it void, unless the invasion of private right was flagrant and its demonstration clear. * * * We have no doubt that a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax or contribution to a common burden, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name."

And if we give it this effect, we make it accord with the ruling in another case, argued, submitted and considered, at

practically the same time, and involving a kindred question, namely, the consistency of certain municipal taxation with the fourteenth amendment to the Federal Constitution. We refer to the case of *Henderson Bridge Co. v. Henderson City*, 173 U. S., 614–616, wherein this court said (through Mr. Justice Harlan, who also delivered the majority opinion in the Norwood case).

"It is conceivable that taxation may be of such a nature and so burdensome as properly to be characterized a taking of private property without just compensation.

"But in order to bring taxation imposed by a State, or under its authority, within the scope of the fourteenth amendment of the National Constitution, the case should be so clearly and palpably an illegal encroachment upon private right as to leave no doubt that such taxation, by its necessary operation, is really spoliation under the guise of exerting the power to tax."

A contrary view would do violence to the rule of *stare decisis*, to which this court has shown constant adherence, and would annul innumerable contracts, of vast aggregate amount, which were entered into and executed in reliance upon a state of the law, existing for many years and repeatedly declared by the courts to be fixed and settled beyond controversy.

And to what good? That property benefited by the work done under those contracts might escape liability, and this, though the owners had stood by in silence and permitted the work to proceed without objection?

Would any practical improvement occur over the past method of assessments? Of the many authorities which have approved legislative assessments by fixed rule, a con-

siderable number have declared that course of procedure to be conducive to better results than any other, and some have suggested that an ascertainment of benefits by commissioners might be accompanied by favoritism and even corruption. But, irrespective of the latter suggestion, the fact remains that, if an assessment is to be made for each local improvement by a proceeding judicial in nature, the same lot, instead of being chargeable merely for the street pavement in front of it, may be held chargeable in some degree for a remote improvement of the abutting street, or for the improvement of some neighboring street, and in the end there may be several notices, and several inquiries the mere expense of which to the land-owner, without including any assessment, would exceed the assessment under the frontage rule. Indeed, we note that in the State of New Jersey, in which the validity of an assessment *by the legislature* according to frontage is denied, assessment according to frontage *by commissioners* has been upheld (*Raymond v. Rutherford*, 55 N. J. L., 448), a condition which suggests that a change in the method of assessment from that by the legislature to that by commissioners may still leave the frontage rule in practice, and produce only a difference in attendant expenses.

III.

So much has been said in some cases with reference to the necessity of notice to the land-owner in the case of local improvements that we desire to devote a short space to the subject.

Whenever the rights of a citizen are to be determined by a judicial trial or hearing, he is entitled to notice,

and this right, therefore, exists when local assessments are to be determined by commissioners; but he is not entitled to notice when there is no hearing, and there is none when a local assessment is made pursuant to legislative prescription according to frontage or area. This distinction has been clearly announced by this court in *Hagar v. Reclamation District*, 111 U. S., 701; *Parsons v. District of Columbia*, 170 U. S., 54; *Williams v. Eggleston*, 170 U. S., 311, and other cases cited in these authorities, and it conforms to reason. "In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold, and he thus deprived of his property. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence or other element of a judicial nature, and nothing could be changed by hearing the tax-payer" (*Parsons v. District of Columbia*, 170 U. S., 55). And says Mr. Justice Brewer, in *Gillette v. Denver*, 21 Fed. Rep., 822, a case of sewer assessment almost, if not precisely, identical with that now before the court: "Now, in this case the tax is levied by area, no question of value; no matter of judgment; a mere mathematical calculation, and of what earthly benefit could it be for a tax-payer to have notice of that calculation? He can make it for himself."

However, irrespective of this rule, a sufficient hearing and notice are provided for. Under sections 22 to 26 of article VI of the charter of St. Louis (a copy of which will be found in the appendix of this brief, since they are not all set forth in the brief for the plaintiffs in error, as we expected them to be), a special-tax bill is issued for the sewer assessment

against each lot, and this tax bill can only be enforced by suit against the owner of the lot. In this suit the owner may naturally set up any defense which affects the validity of the tax bill. Indeed, the present proceedings, with the claim of the unconstitutionality of the tax bill, are in such a suit.

This being so, all purposes of the implied constitutional provision for notice and hearing are satisfied, it being sufficient if notice and hearing as to the validity of the tax are provided for at some stage of the proceeding.

Davidson *v.* New Orleans, 96 U. S., 97.
Hagar *v.* Reclamation District, 111 U. S., 701.
City of St. Louis *v.* Richeson, 76 Mo., 470.
Saxton National Bank *v.* Carswell, 126 Mo., 436.

Respectfully submitted.

DAVID GOLDSMITH,
ROBERT E. COLLINS, AND
H. P. RODGERS,
Counsel for Defendant in Error.

APPENDIX.

THE PROVISIONS OF THE ST. LOUIS CHARTER.

"SEC. 20. A sewer system is hereby established, which shall be divided into three classes, viz: 'public,' 'district' and 'private' sewers.

"SEC. 21. Public sewers shall be established and constructed along the principal courses of drainage, at such times, to such extent, of such dimensions and material, and under such regulations as may be provided by ordinance, to be approved by the board of public improvements, and there may be constructed such branches to sewers already constructed, or to be constructed, as may be considered expedient by said board: *Provided*, That no sewer shall be run diagonally through private property when it is practicable to construct it parallel with lines of such property, nor shall any public sewer be constructed through private property when it is practicable to construct it along a street, alley or public highway. An appropriation shall be made to meet the cost of such public sewer from the public revenue.

"SEC. 22. Board to approve district sewer improvements—Authority of assembly in reference to same—Special taxes for district sewers—Repairs to be paid by city.—District sewers shall be established within the limits of districts, to be prescribed by ordinance as approved by the board of public improvements, and so as to connect with a public sewer, or some natural course of drainage. Such district may be subdivided, enlarged or changed, upon the recommendation of said board, by ordinance, at any time previous to the construction of the sewer therein. The assembly shall cause sewers to be constructed in any district whenever a majority of the property-holders resident therein shall petition therefor, or whenever

the board of public improvements shall recommend it as necessary for sanitary or other purposes; and the character, dimension and material of such sewer shall be prescribed and may be changed, diminished, enlarged or extended, and such sewer shall possess all requisite laterals, inlets and other appurtenances. As soon as a district sewer, with its inlets, manholes and other appurtenances is fully completed, the said board shall cause to be computed the whole cost thereof, and shall assess it as a special tax against all the lots of ground in this district respectively, without regard to improvements, and in proportion as their respective areas bear to the area of the whole district, exclusive of the public highway; and the board shall cause to be made out a certified bill of such assessment against each lot in the district, in the name of the owner thereof, which shall be collected and paid in the manner hereinafter prescribed: *Provided*, That the repairs and other incidental expenses of district sewers shall be paid out of the general revenue."

SEC. 23. (This section relates wholly to private sewers, and is, therefore, omitted.)

"SEC. 24. Special-tax bills—How made out.—All special-tax bills for work contemplated by this charter shall be made out by the president of said board, and by him registered in his office in full, and certified and delivered to the comptroller, and his receipt taken therefor, and by him registered and countersigned and delivered to the party in whose favor it is issued for collection, and his receipt taken in full of all claims against the city on account of said work.

"SEC. 25. Special-tax bills to be a lien on property—Manner of collecting same—City not to be liable for special-tax bills, etc.—Said tax bill shall be and become a lien on the property charged therewith, and may be collected of the owner of the land, in the name of and by the contractor, as any other claim in any court of competent jurisdiction, with interest at the rate of ten per cent. per annum, after thirty days from

demand of its payment date; and if not paid within six months after such demand, then at the rate of fifteen per cent. per annum from the date of said demand. In case the owner of the ground is a non-resident of the State, suit may be brought by attachment, which shall be a demand of its payment. Such certified bill shall in all cases be *prima facie* evidence that the work and material charged in such bill shall have been furnished, and of the execution of the work, and of the correctness of the rates or prices, amount thereof, and of the ability of the person therein named as the owner of the land charged with such bill to pay the same: *Provided*, That nothing in this section shall be so construed as to prevent the party charged with the payment of said bill from pleading, in reduction of the amount of same, that the work therein mentioned was not done in a good and workmanlike manner; and provided that if the party charged shall set up, by way of defense, that the work was not done in a workmanlike manner, according to the class of work mentioned in the contract, and that such party before the commencement of the suit, tendered to the contractor the full value of such work as done, and shall establish the same on the trial, the recovery shall only be for the amount so tendered, and judgment for costs shall be rendered against the plaintiff. The city shall not be liable, in any manner whatever, for or on account of any work done which is to be paid for in the manner provided in this section.

"SEC. 26. Whenever any such special-tax bill issued heretofore, or hereafter to be issued, shall be paid, it shall be entered 'satisfied' on the register in the comptroller's office; and any bill that is not entered 'satisfied' within two years after its date, unless proceedings in law shall have been commenced to collect the same within that time, and shall still be pending, the lien shall be destroyed and of no effect against the land charged therewith."

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Supreme Court of the United States.

No. 550.—October Term, 1900.

John L. Shumate, Plaintiff in Error, vs. August Heman. } In error to the Supreme Court of the State of Missouri.

[April 29, 1901.]

Mr. Justice Shiras delivered the opinion of the Court.

This was a suit brought in the Circuit Court of the city of St. Louis by August Heman to enforce payment of a special tax bill issued in his favor by that city for the construction of a sewer in what is called Euclid avenue sewer district. The plaintiff recovered a judgment, and the defendants, who were owners of property assessed for the cost of making said sewer, appealed to the Supreme Court of Missouri, where the judgment of the trial court was affirmed, the case being reported as *Heman* v. *Allen*, (156 Mo. 534;) and after such affirmance the defendant brought the case to this court by writ of error.

The only question which is open to our consideration upon this record is the contention of the plaintiff in error, that the provisions of the charter of the city of St. Louis, the ordinances of the municipal assembly, the contract made with the defendant in error made thereunder, and the assessment against the property of the plaintiff in error for the cost of the construction of said sewer, were null, void and of no effect, for the reason that they were repugnant to the Fourteenth Amendment of the Constitution of the United States, as construed and applied in the case of *Norwood* v. *Baker*, (172 U. S. 269.)

This contention has been considered and determined, under a similar state of facts, by this court, in the recent case of *French* v. *The Barber Asphalt Paving Company*, in error to the Supreme Court of the State of Missouri, (181 U. S. ——,) and upon the authority of that case the judgment of the Supreme Court of Missouri is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.